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TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 139.

LOUIS ZECKENDORF, APPELLANT,

vs.

ALBERT STEINFELD, J. N. CURTIS, R. K. SHELTON, ET AL.

No. 140.

**ALBERT STEINFELD, J. N. CURTIS, R. K. SHELTON, ET AL.,
APPELLANTS,**

vs.

LOUIS ZECKENDORF & SILVER BELL COPPER COMPANY.

**APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF
ARIZONA.**

FILED OCTOBER 4, 1909.

(21,848.)

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In the Supreme Court of the Territory of Arizona.

No. 1101.

LOUIS ZECKENDORF, Appellant,
v.
ALBERT STEINFELD et al., Appellees.

ALBERT STEINFELD et al., Appellants,
v.
LOUIS ZECKENDORF, Appellee.

On Cross-Appeal from the District Court of the First Judicial District of the Territory of Arizona.

Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., Attorneys for Louis Zeckendorf, Appellant-Appellee and Eugene S. Ives Esq., and Francis J. Heney Esq., Attorneys for Albert Steinfeld et al., Appellants-Appellees.

Be it remembered that on to-wit: the eleventh day of January, 1907, came the Appellants-Appellees, in the above entitled cause, by their Attorneys Messrs. Eugene S. Ives and Francis J. Heney and filed in the clerk's office of said court, in said entitled cause, a certain Stipulation in words and figures following to-wit:

In the Supreme Court of the Territory of Arizona.

(Title of Cause.)

Whereas, an appeal in the above entitled cause was heretofore had in this court, and abstracts of record were duly filed therein, the same being very extensive; and Whereas, upon the new trial the pleadings were amended, and the parties stipulated that the evidence, admissions and stipulations in the former trial should constitute the record upon such new trial, together with such papers as might have been filed by the respective parties thereto since the record in the former trial was completed, and subject to certain stipulations entered into by the parties hereto, now

It is hereby stipulated between the parties hereto, subject to the approval of the court, that a supplemental abstract of the record be filed, consisting of the amended pleadings, the findings, judgment, motions for new trial, minute entries and stipulations made since the former trial, and that such abstracts of record together with the abstract of record filed upon the former appeal shall together constitute the abstract of record upon these appeals subject to the right of either party to file such additional or supplemental abstracts of record as they may under the law have the right. And

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LOUIS ZECKENDORF VS. ALBERT STEINFELD ET AL.

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It is further stipulated that the parties hereto join in an application to the supreme court to confirm this stipulation. Dated, Tucson, Arizona, October 5th, 1908.

E. A. MESERVE,
FRANK H. HEREFORD,
FRANCIS J. HENEY,
EUG. S. IVES,

Attorneys for the Respective Parties.

And on the same day to-wit: the eleventh day of January, 1909, came the Appellants-Appellees by their Attorneys Messrs. Edwin Meserve and Frank H. Hereford and filed a certain Abstract of Record in the office of the clerk of said court in said entitled cause which said Abstract of Record is in words and figures following to-wit:

3

In the Supreme Court of the Territory of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY, a Corporation, and Mammoth Copper Company, a Corporation, Defendants-Appellants.

Abstract of Record.

This action was commenced by the filing of the complaint on or about the 27th day of January, 1904.

The defendants duly interposed their answer.

The plaintiff thereafter and during the trial filed certain amendments to the complaint, to all material parts of which amendments the defendants were presumed to have entered a specific denial.

After the court rendered judgment, but before the findings of judgment were signed, the defendants by *by* leave of court, filed amendments to their answer to the original complaint without waiving their right to consider as denied the allegations of the amended complaint.

The issues came on to be tried on the 16th day of May, 1905, before the Honorable John H. Campbell sitting without a jury, and the testimony was closed on the 24th inst.

Argument was thereafter had and the case submitted upon briefs.

On the 16th of September the Judge announced that he had found in favor of the plaintiff.

The findings and judgment were settled and signed on the 21st day of October, and were entered upon that day.

The following are the complaint as amended, the answer as amended, findings, judgment, motion for a new trial and amended motion for new trial, the minute entries and all such portions of the testimony and exhibits as the appellants believe will be useful to either party upon the hearing of the appeal.

The evidence proving the exhibits has been omitted, it being conceded that all exhibits were properly proved upon the trial.

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Amended Complaint.

[Title of Cause.]

Now comes the plaintiff in the above-entitled action and, complaining of the above-named defendants, for cause of action alleges:

I.

That the defendant, the Silver Bell Copper Company, is now, and for all of the times herein mentioned, has been a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County of Pima, in said Territory; that, for all of the times herein mentioned, defendants Albert Steinfeld, J. N. Curtis and R. K. Shelton have been and now are the directors of said corporation, all of said parties being residents of said City of Tucson, County and Territory aforesaid;

That plaintiff for all of the times herein mentioned, has been and now is a stockholder of said corporation and he is now and, for all of the times herein mentioned, has been a resident of the City of New York, State of New York;

That the entire capital stock of said corporation was divided into one thousand shares, all of which said one thousand shares was originally issued by said corporation, for value, in accordance with the laws of the said Territory of Arizona; that thereafter, and prior to the 20th day of May, 1903, three hundred shares of the said stock were purchased by said corporation, the same being taken in the name of Albert Steinfeld, trustee; that at all times after said purchase, said Albert Steinfeld held said stock in his possession as trustee as the property of and for the benefit of said corporation; that since long prior to the said 20th day of May, 1903, the actual outstanding stock of said corporation has been seven hundred shares, divided, owned and held as follows: By Albert Steinfeld, two hundred and forty-nine shares; by R. K. Shelton, one share; apparently by J. C. Curtis, one hundred and seventy shares; by Albert Steinfeld, trustee for J. W. Zeckendorf, thirty shares and by this plaintiff, two hundred and fifty shares; that the said one share of stock standing upon the books of the company in the name of said R. K. Shelton was, in fact, the property and is now the property of said Albert Steinfeld and said R. K. Shelton, as a matter of fact, has no interest or property therein;

That the said Mammoth Copper Company is now and, for all of the times herein mentioned, has been a corporation organized and existing under the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima County, said Territory; that the defendant Albert Steinfeld is now, and for all of the times herein mentioned, has been the owner in fact of all of the capital stock of said Mammoth Copper Company, that any stock standing in the name of any other party in order to enable him to qualify as a director is simply held by said party for that purpose and the same belongs to and is, in fact, the property of

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the said Albert Steinfeld, and the said Mammoth Copper Company, as this affiant is informed and believes and so alleges *that* the fact to be, is but an instrument in the hands of the defendant Albert Steinfeld used by him for the purpose of transacting business for himself, in his own name and for the purpose of covering up any frauds or illegal transactions which he may enter into, or care to enter into in the name of the said Mammoth Copper Company; that any money which may, on its face, have been paid to the defendant Albert Steinfeld and any property which may, on its face, have been delivered to the said Albert Steinfeld, as hereinafter alleged and set out, for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company, jointly, in fact and in truth, were paid and delivered to the said Albert Steinfeld and were appropriated, by him, to his own individual use;

II.

8 That the said R. K. Shelton, defendant, at all the times herein mentioned, has been the representative of said Albert Steinfeld on said board of directors and, at all times herein mentioned, has voted as ordered, directed and requested by said Albert Steinfeld, and not otherwise; that said defendant J. C. Curtis, at all times herein mentioned, was under the control and direction of said Albert Steinfeld and, as a director of said corporation, at all times, did what the said Albert Steinfeld directed or requested and, at no time and under no circumstances, did the said J. C. Curtis, as a director of the said corporation, do any act, take any vote, or cast any ballot, except as requested or directed by the said Albert Steinfeld; that the said Albert Steinfeld, at all of the times herein mentioned, was, in fact, by reason of his control of the other two members of the said board, in absolute control and direction of the board of directors of the said defendant corporation and all acts, things and votes taken by said board since before the 20th day of May, 1903, and up to and including the present time, were taken by and under the direction of the said Albert Steinfeld and at his request, and not otherwise, and all votes, motions, resolutions and other acts of said board adopted, passed or done by it were done by and under the direction of and control of the said Albert Steinfeld, and not otherwise;

9 That because of the facts hereinabove alleged, it would be an idle and useless act for this plaintiff to make any demand whatsoever on the said board of directors to bring any action against the said Albert Steinfeld, the said J. C. Curtis or the said R. K. Shelton for the recovery of property belonging to the said corporation or for the payment to said corporation of any debt owing by said parties or either or them and particularly by the said Albert Steinfeld, to said corporation and that any such action if brought in the name of said corporation, would not be prosecuted in good faith and with a full intent and purpose that a full recovery should be had thereon for the benefit of said corporation, and of this plaintiff, as a stockholder thereof; and, for such reasons and because of such facts and because it would be idle and purposeless so to do, this plaintiff has made no demand whatsoever on said corporation that it

bring this action or that it prosecute the same; and this plaintiff now brings this action as a stockholder of said defendant corporation for its use and benefit and in order that its property, illegally taken from it as hereinafter set forth, may be recovered and restored to its assets;

Paragraph III.

"That on and prior to the 20th day of May, 1903, and at the time of the making of the sales by the said Silver Bell Copper

10 Company, hereinafter alleged and set out, said Silver Bell Copper Company was the owner of certain properties in the Silver Bell Mining District, County of Pima, Territory of Arizona, listed and scheduled in Exhibit A hereto attached; that prior to the said 20th day of May, 1903, said Albert Steinfeld, in his own name and in the name of the said Mammoth Copper Company, had purchased certain of the said properties listed and scheduled in said Exhibit A, the same being purchased, however, in trust for and for the use and benefit of said defendant Silver Bell Copper Company;

That said Steinfeld had expended in the purchase of said properties a certain sum of money, which, with interest thereon, from the date of the expenditure to the 20th day of May, 1903, at the rate of one per cent per month, would amount on the said 20th day of May, 1903, to the sum of \$18,117.00; that prior to said 20th day of May, 1903, the said Steinfeld, in his own name and in the name of said Mammoth Copper Company, had offered to said Silver Bell Copper Company, in writing, that said properties would be conveyed to said Silver Bell Copper Company, upon said Steinfeld being paid back the amount of such expenditure, with interest thereon, as aforesaid, the said Silver Bell Copper Company, in consideration thereof, to pay the assessment work to be done on said properties; that said Silver Copper Company, after the receipt of said offer, did pay all the annual assessment work

11 required to be done on said properties, and from time to time expended large sums of money in the development of said properties so standing in the name of said Albert Steinfeld and said Mammoth Copper Company, the said Silver Bell Copper Company at all times after the purchase of said properties by said Steinfeld as aforesaid, being in possession of and in the use and occupancy of the said properties.

That on said 20th day of May, 1903, and prior to the making of the sale hereinafter set out and alleged, said Albert Steinfeld (he being the owner of all of the stock of the said Mammoth Copper Company) presented to the said defendant, the said Silver Bell Copper Company, the renewal of said offer to transfer said said properties so standing in his name and in the name of the said Mammoth Copper Company, upon his (the said Steinfeld) being paid the sum of \$18,117.00, which said offer on the part of said Steinfeld, by resolution of the Board of Directors of said Silver Bell Copper Company, entered in the minutes of said corporation, was then and there accepted by said Silver Bell Copper Company, said Steinfeld as a member of said board, voting in favor of the adoption

of said resolution and of the acceptance of said offer and tender; that no separate transfer or conveyance was made by said Albert

Steinfeld or said Mammoth Copper Company of any of said
12 properties to said Silver Bell Copper Company, but on said

20th day of May, 1903, the said Silver Bell Copper Company sold all of the properties listed and described in said schedule and Exhibit A, to the Imperial Copper Company, for the agreed price of \$515,000.00 gold coin of the United States, payable as hereafter stated, the said Albert Steinfeld and the said Mammoth Copper Company joined with the said Silver Bell Copper Company in the deed of conveyance of said properties to said Imperial Copper Company; that said Albert Steinfeld and Mammoth Copper Company joined in said deed simply and for the purpose that the legal title to any of said properties which might be standing in the names of both or either of said parties, should be conveyed and transferred to said Imperial Copper Company, it being then and there agreed, however, by and between the said Silver Bell Copper Company, the said Imperial Copper Company and the said Steinfeld that the said \$515,000.00 purchase price of said properties was the property of the Silver Bell Copper Company, and that all cash and notes representing said purchase price or instalments thereof, as hereinafter stated, were the property of said Silver Bell Copper Company; that the said purchase price of \$515,000.00 under and by virtue of said contract with the said Imperial Copper Company, became payable

as follows: \$115,000.00 in cash on said 20th day of May,
13 1903, and \$400,000.00 in four equal payments of \$100,000.00 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the said Silver Bell Copper Company, each of said notes being dated the 20th day of May, 1903, and bearing interest from said date to the date of the payments thereof, at the rate of six (6) per cent per annum; that said sum of \$115,000.00 in cash was paid by said Imperial Copper Company to said Albert Steinfeld, as the Treasurer of and for the said Silver Bell Copper Company; that said Albert Steinfeld, out of said sum, paid to himself the said sum of \$18,117.00, the amount as heretofore stated of the expenditures there fore made by him in the acquiring of certain of said properties, with the interest thereon from the date of payment thereof by said Steinfeld to the said 20th day of May, 1903, at the rate of one per cent per month, that after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company paid two of said promissory notes, paying the principals thereof with the interest at said rate of six per cent per annum on said principal up to the respective dates of payment making a total of

cash paid to the said Silver Bell Copper Company, by said
14 Imperial Copper Company prior to January 1, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said Exhibit A, of the sum of \$319,487.50; that the said sums of money, aggregating the said sum of \$319,487.

50, were received by the said Silver Bell Copper Company from said Imperial Copper Company as and for the first cash payment, and as the payments of the two promissory notes first falling due on the said purchase price of said sale so made by said Silver Bell Copper Company to said Imperial Copper Company, and all of the said money not now on hand and in the possession of said Silver Bell Copper Company was paid out and disbursed by the said Silver Bell Copper Company under the direction, management and control of the said Albert Steinfeld or by the said Albert Steinfeld personally while he held in his possession as the treasurer of said company, the first instalment cash payment above alleged and set out, which said expenditures so made by said Albert Steinfeld as aforesaid, were not made on any prior order of the board of directors of said Silver Bell Copper Company, though all of said payments were thereafter ratified except as herein stated, by said board upon said Steinfeld submitting to said board the statement in writing of the said expenditures so made by him. That of said sum there was paid out for and on account of certain debts and contracts of the Silver Bell Copper Company, a total of about \$118,000.00,

15 and to the said Albert Steinfeld as aforesaid the said sum of \$18,117.00, which said last mentioned sum, the said Albert Steinfeld personally and individually, and for his own use and benefit, received of and from the said Silver Bell Copper Company, as a full payment to him and to the said Mammoth Copper Company of all sums whatsoever that might be due or owing from said Silver Bell Copper Company for or on account of any or all interests that the said Steinfeld and the said Mammoth Copper Company, or both, had or might have in or to any of the said properties, so listed and scheduled in said Exhibit A, and so sold and conveyed to said Imperial Copper Company, and in accepting said sum of \$18,117.00 as aforesaid, said Steinfeld and the said Mammoth Copper Company thereby released and relinquished to the said Silver Bell Copper Company any and all interests either or both might have had or did have in or to any of said properties so listed and described in said schedule Exhibit A."

IV.

That after the completion of the sale aforesaid and after the receipt by the said Silver Bell Copper Company of said sum of \$115,000.00, in cash, and of the said four promissory notes, each for \$100,000.00, and interest, the said Albert Steinfeld, Mammoth Copper Company and Silver Bell Copper Company, on or about
16 the 26th day of May, 1903, and not earlier than May 25th, 1903, executed a memorandum in writing, dated May 20th, 1903, denominated an agreement, in and by which the said parties recited, over their own signatures, that all of the proceeds of said sale, including the said notes and the said cash, were the property of the said Silver Bell Copper Company, and that the said Albert Steinfeld and the said Mammoth Copper Company had no interest whatever therein; that said memorandum in writing purported to give to said Albert Steinfeld the sole custody of said money and

notes and of the proceeds thereof for one year thereafter; that a copy of said memorandum so signed by the said parties, was spread upon the minutes of a meeting of the said board of directors of said defendant corporation, the Silver Bell Copper Company, held after the 24th day of May, 1903, and on or about the 26th day of May, 1903, the minutes of said meeting however being incorrectly dated the 20th day of May, 1903, in order thereby to indicate that said meeting was held on said date when in truth and in fact it was not so held as hereinabove alleged. That said Albert Steinfeld acted as a director at said meeting and controlled, directed and managed the other two directors acting with him.

That under date of the 26th day of December, 1903, but whether on said date or at a latter date this plaintiff does not know.

- 17 the said defendants Shelton, Steinfeld and Curtis, purported to hold a meeting as a board of directors of said Silver Bell Copper Company and to act as directors of the said defendant corporation, and at such meeting and so acting purported to pass a resolution wherein and whereby the said Silver Bell Copper Company purported to rescind the said memorandum or so called agreement, dated May 20th, 1903, a copy of which resolution was spread upon the minutes of said meeting aforesaid, but as this plaintiff is informed and believes and so alleges, said board did not attempt to and did not rescind any other of the transactions of said meeting, held on or about May 20th, 1903, entered in the minute book as being held on May 20th, 1903, and particularly did not purport to or attempt to and did not rescind the transaction by which the defendant, the Silver Bell Copper Company repaid to and reimbursed the said Albert Steinfeld, and the said Albert Steinfeld received from the said company said sum of \$18,117.00; that any action or purported action on the part of said board of directors, except with reference to the custody of said money and funds, was not consented to by this plaintiff, and this plaintiff has not consented to or ratified the same, and because of the facts herein alleged, the same are not binding on said corporation; that thereafter and without further action whatsoever by the said Silver Bell Copper Company, and without any stockholder of the said company, other than said Curtis, Steinfeld and Shelton, having any knowledge whatsoever thereof, or of such intended action, on or about the 16th day of January, 1904, the said Steinfeld, Curtis and Shelton, purporting to act as a board of directors of said corporation, purported to adopt and pass a resolution, and caused the same to be spread upon the minute book of said corporation, wherein and whereby the said parties so acting as aforesaid recited the fact that Albert Steinfeld and the said Mammoth Copper Company claimed that their interests in the properties conveyed as heretofore set out, by the said Silver Bell Copper Company to the said Imperial Copper Company, were of greater value than were the interests of the said Silver Bell Copper Company therein, and that the said Albert Steinfeld and the said Mammoth Copper Company (of which the said Albert Steinfeld was the sole and only stock holder, as hereinabove alleged, and therefore was the practical owner) claimed that they
- 18

were entitled to more than one-half of the said purchase price of \$515,000.00 so received by the said Silver Bell Copper Company, from the said Imperial Copper Company, and thereupon the said Steinfeld, Curtis and Shelton at said purported meeting and purporting to act as the board of directors of said corporation, and as an act prepared by and for said Albert Steinfeld and at his request and on his direction further resolved that the said Silver Bell

19 Copper Company should pay to the said Albert Steinfeld personally and for his own individual use and benefit, one-half of the said cash already received, less one-half of the sum of \$28,000.00, theretofore paid by the said *by the said* Silver Bell Copper Company as commissions and expenses in connection with the making of said sale, and that the said Silver Bell Copper Company should also, at the same time, deliver or cause to be delivered to the said Albert Steinfeld, one of the two promissory notes belonging to said corporation, still remaining unpaid and still in the hands of the corporation, and that said Albert Steinfeld should retain as his own the sum of \$25,750.00, being one-half of the sum of \$51,500.00 still in his hands belonging to the said Silver Bell Copper Company, and garnished by one Franklin as its property, that thereupon said J. N. Curtis, being then the Treasurer of said Silver Bell Copper Company, and as such having in his possession the cash, and under his control the notes hereinafter mentioned, and under no other authority or claimed authority than as hereinabove set out, paid to the said Albert Steinfeld of the said funds of the said Silver Bell Copper Company then on hand, the sum of \$145,743.75, in cash (the same being one-half of the said sum of \$319,487.50, less the said sum of \$28,000.00 and delivered or caused to be delivered to

20 said Albert Steinfeld one of said notes, and which said funds and notes said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company.

The said note so delivered to said Albert Steinfeld at the time of such delivery was worth the full amount of the principal and interest thereof, viz., \$100,000.00, with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent per annum; and said Steinfeld collected said full sum thereon.

That said Steinfeld also returned the said sum of \$25,750.00 still remaining in his hands as aforesaid, and thereupon converted the same and said sum of \$145,743.75 and said note so delivered to him as aforesaid and the proceeds thereof to his own use and benefit, and not for the use and benefit of any other person firm or corporation and has ever since and does now retain the same and the same has not, nor has any part thereof ever been paid back to the Silver Bell Copper Company or returned to it, and nothing whatever on account thereof has ever been paid to said corporation or for it, but the whole remains unpaid.

V.

That the board of directors of the said Silver Bell Copper Company, still acting under the management and still controlled by the

21 said Albert Steinfeld, subsequent to the said 10th day of January, 1904, and prior to the 16th day of January, 1904, caused to be sold the other of the said two promissory notes remaining unpaid, receiving thereon, on account of the principal and interest, a total of \$103,967.00, which said sum was paid into the treasury of the Silver Bell Copper Company and deposited to its account in the banks in the City of Tucson, Territory of Arizona;

That this plaintiff is informed and believes and, upon such information and belief, alleges the fact to be that the said Albert Steinfeld sold the other of the said two notes, receiving therefor a like sum, namely the sum of \$103,967.00; that this plaintiff is informed and believes, and alleges the true fact to be that the said Albert Steinfeld sold and discounted both of the said notes at the same time and as one and the same transaction, appropriating to his own use, the proceeds of one of said notes and causing to be paid into the treasury of the Silver Bell Copper Company and into the said banks on its accounts, the proceeds of the other of the said two notes, and that none of the other officers of the said Silver Bell Copper Company, and no person acting or purporting to act for it, other than said Albert Steinfeld, had aught to do with the sale, or purported sale, of either of said notes, the said Albert Steinfeld purporting to act and, in fact, acting as the sole and only and controlling officer and agent of said defendant, the Silver Bell Copper Company;

22

VI.

That on the 20th day of January, 1904, and at the time of the holding of the meeting next hereinafter alleged and set out, there remained on deposit in the hands of the said Silver Bell Copper Company, and in the hands of its treasurer, a total of \$111,750.00, being all that remained of the said sum of \$515,000.00 after the misappropriation and wrongful diversion of the funds and property of the said corporation hereinabove alleged and set out; that thereupon, and on the 20th day of January, 1904, the said above-named defendants, Steinfeld, Curtis and Shelton, all acting under the control, management and direction of the said Albert Steinfeld and purporting to act as a board of directors of the said defendant the Silver Bell Copper Company, passed a resolution wherein and whereby they purported to declare a dividend of \$111.00 per share on the full one thousand shares of the stock of the said Silver Bell Copper Company, the said defendant Albert Steinfeld claiming to be the owner, at that time, in his own right and as his own property, of the said three hundred shares of stock hereinabove alleged and referred to standing in his name, as trustee, for the benefit and as the property of the said defendant corporation, the Silver Bell Copper Company, and, thereupon, the said Albert Steinfeld, being solely in control of the said defendant corporation, the Silver

23 Bell Copper Company, caused to be paid to him the sum of \$33,000.00, being \$111.00 per share on said three hundred shares of stock and the said Albert Steinfeld received the same and appropriated the same to his own use, and the said Steinfeld, still having the control of the said defendant corporation and of the said

directors and each and all of the officers thereof, caused to be paid to him the further sum of \$27,639.00 as and for the dividend on the two hundred and forty-nine shares of stock really belonging to the said Albert Steinfeld, as hereinabove mentioned and set out; that, thereupon, the said Albert Steinfeld caused to be issued to the said R. K. Shelton a check for \$111.00, which said check, however, as this plaintiff is informed and believes and therefore alleges the fact to be, was thereafter turned over to the said Albert Steinfeld and the proceeds thereof paid to the said Albert Steinfeld and appropriated by him to his own use; that as part of the same transaction and under the agreement by which the said Shelton, Steinfeld and Curtis agreed to pass the resolution declaring the said dividend, it was agreed that there should be paid to the said Curtis, the sum of \$111.00 per share on the one hundred and seventy shares standing in his name on the books of the company and thereupon there was paid to the said Curtis the sum of \$18,870.00, which said

24 sum of money the said Curtis received from the said Silver Bell Copper Company and appropriated to his own use;

That the money so paid to the said Curtis and to the said Steinfeld and Shelton as dividends aforesaid, were all paid, as this plaintiff is informed and believes and so alleges the fact to be, under the agreement and arrangement entered into at the time the said \$145,743.75 and the said note were turned over to the said Albert Steinfeld, as hereinabove alleged and set out, and this plaintiff alleges, on his information and belief, that at the time, it was agreed between the said Steinfeld, Curtis and Shelton, that there should be paid to the said Steinfeld the said sum of \$145,743.75, and that there should be turned over to him the said note; there should also be declared the said dividend so that the said Curtis should receive the said sum of \$18,870.00 and that all of said acts were done under and — a part of one transaction, contract, and arrangement and this plaintiff is further informed and believes, and so alleges the fact to be, that the said sum of \$18,870.00 was paid to the said Curtis as consideration to him for his agreeing that the said Steinfeld should be paid the said sums hereinabove set out and should receive the said note;

VII.

25 That shortly after the payment of said Imperial Copper Company to said Silver Bell Copper Company, of the said first cash payment of \$115,000.00, one S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company, garnishing in the hands of the said Albert Steinfeld the sum of \$51,500.00, which said sum of money the said Franklin claimed the said Silver Bell Copper Company then owed to him and for which sum the said Franklin was then suing the said corporation; that thereafter and about the time the said directors of the said Silver Bell Copper Company purported to allow to the said Albert Steinfeld the one-half of the proceeds of the aforesaid price, there was executed by and on behalf of the said Silver Bell Copper Company, a bond, releasing the said attachment so levied in the said action brought by the said

Franklin, and releasing from the effects of the said judgment, the said sum of \$51,500.00 so garnishe-d in the hands of the said defendant Steinfeld; that thereupon the said defendant Steinfeld, claiming to be the owner of one-half of said sum, under and by virtue of the said resolution of the said directors of the Silver Bell Copper Company, so passed at his instance and under his direction, as hereinabove set out and alleged, appropriated to his own use the sum of \$27,750.00, this being the one-half of \$51,500.00 and thereupon paid into the treasury of the said defendant Silver Bell Copper Company, the other one-half of said sum, namely, \$25,750.00;

VIII.

That plaintiff is informed and believes and, upon such information and belief alleges, that subsequent to the said 20th day of May, 1903, and prior to the said 10th day of January, 1904, the said Albert Steinfeld, having in his possession all of the money from time to time received by the said Silver Bell Copper Company on said purchase price, used said money for his own benefit and loaned said money to others, and that said Albert Steinfeld, realized on the said money so used by him belonging to the said Silver Bell Copper Company between said dates and for the use of said money, a sum in excess of \$2,500.00, and which said profit the said Albert Steinfeld realized to himself by the use of and by loaning to others as his own the said money belonging to the said Silver Bell Copper Company;

IX.

That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and for the benefit of the said Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; that this plaintiff, in that regard, has employed as the attorneys for the bringing of this action for the benefit of the said Silver Bell Copper Company, Edwin A. Meserve, of Los Angeles, California, and Messrs. Hereford & Hazzard, of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees, and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid, to plaintiff or to those to whom he is obliged therefor by the said defendant Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action.

X.

That, at all of the times above mentioned, when the above named Shelton, Curtis and Steinfeld were purporting to act as directors of the above-named corporation and, as such, were purporting and at-

tempting to divert from the funds of said corporation the above-named sums of money so paid to the said Steinfeld, Shelton and Curtis, and at the times above alleged, when they were purporting to act for the said corporation and to cause said corporation

28 to transfer to the said Steinfeld, the said above-mentioned promissory note, each and all of said parties well knew that neither the said Steinfeld or the said defendant Mammoth Copper Company had any right, title, interest or estate, at any time, in or to any of the said properties described in schedule "A," hereto annexed, and well knew that neither the said Mammoth Copper Company, nor the said Albert Steinfeld, had any right to any of the money or properties of the said Silver Bell Copper Company, except such as the said Albert Steinfeld might have been entitled to by reason of his ownership of the two hundred and fifty shares of stock (being the two hundred and forty-nine shares standing in his name and the one share standing in the name of the said Shelton, as hereinabove set out) and each and all of the said parties well knew that the payment to the said Albert Steinfeld of the said sums of money hereinabove set out and the delivery to him of the said note were in violation of the rights of the said corporation and this plaintiff, as the sole remaining stockholder thereof, and the said acts upon the part of the said defendants were done for the purpose of robbing the said corporation and of misappropriating and stealing its funds and for the sole and only purpose of enabling the said Albert Steinfeld to rob and steal from this plaintiff the share of the properties of the said corporation which would, otherwise, be coming to him,

29 as the owner of the said two hundred and fifty shares of stock standing in his name, as hereinabove alleged and set out, and each and all of said defendants, at all times, well knew that they had no right to declare the said dividend of \$111.00 per share, the same being declared as a part of the same transaction, and under the same agreement by which the said moneys and the said note were so misappropriated as hereinabove alleged, and each and all of the said parties well knew that in the declaring of said dividend and in the payment of the said moneys thereunder, they were violating their duties as directors of the said corporation and were using their positions as such directors to enable themselves and the said Albert Steinfeld to appropriate to their own use, wrongfully and illegally and in violation of the rights of the said incorporation and of this plaintiff, as a stockholder thereof, the funds and properties of said corporation; that the only properties the said Silver Bell Copper Company ever owned or was ever possessed of, outside of its office books, papers and records, were the properties conveyed by it to the said Imperial Copper Company, as hereinabove alleged and set out, and that, after the making of said conveyance, the only properties the said Silver Bell Copper Company ever owned, were the proceeds of said sale in cash and in notes, as afore-said, and the said Silver Bell Copper Company now has no other property, except that which is shown

30 by the complainant as now left in the treasury of said corporation and which consisted only of moneys which the said directors are illegally, unlawfully and inequitably trying to force

upon this plaintiff as his share of the divisible proceeds of said sale; that, as hereinabove alleged and set out, there are two actions pending against said corporation, one for the sum of \$51,500.00 by S. M. Franklin, and the other for \$50,000.00 by J. W. Burnett, claimed to be owing to him as and for commissions and for services rendered to and for the benefit of said corporation; that said corporation has other debts, the exact nature and amount of which are not now known to this plaintiff and if the said funds and properties of the said corporation are allowed to be diverted, misused and misappropriated as hereinabove alleged and set out, the said corporation will be insolvent and unable to meet and pay the said debts and the said judgments, in the event the plaintiffs therein recover as and in accordance with the prayers of their complaints; that, as hereinabove alleged and set out, the defendants Shelton, Curtis and Steinfeld are the directors of the said corporation; that said Curtis and Shelton are under the absolute control of said Steinfeld; that if the moneys belonging to the corporation which have been heretofore illegally diverted, misappropriated and stolen from the said corporation, as hereinabove alleged, by and through the knowing acts of said directors,

31 under the direction and control of the said Steinfeld, as hereinabove alleged and set out, again put under the control of said defendant directors all of said money will still be under the control of said Steinfeld, and the said Steinfeld, so having the control of said money and of the properties of the said corporation, will again misuse his power and will again misappropriate and wrongfully divert the funds and properties of the said corporation and will again convert the same to his own use in a manner that the same may not be followed by this plaintiff or by any other stockholder of the said corporation or other party who may be interested in the same; that it is inequitable that said money should be paid by the said defendants again into the custody and control of the said directors to be again misappropriated and wrongfully diverted by them; that, to that end, it is, therefore, meet, equitable and proper that a receiver of the properties, books and papers of said corporation should be appointed by this court in order to receive the said money and to properly apply the same to the business and debts of said corporation and that the same may be properly paid out, used and handled as this court, in the exercise of its discretion, may herein order, decree and determine.

That no part of any of said money so paid to the said Albert Steinfeld or retained by him, as hereinabove alleged, and no part of the proceeds of said note so delivered to him, and no part of the
32 dividends so paid to said Shelton, Curtis and Steinfeld has ever been paid back to said corporation or for its benefit, but the whole thereof still remains unpaid.

Wherefore, the plaintiff above named prays:

1. That it be adjudged and decreed that the acts of the said board of directors of the defendant, the Silver Bell Copper Company, hereinabove alleged and set out, purporting to authorize and direct the payment to the said Albert Steinfeld and Mammoth Copper Company of the said sum of \$145,743.75 and of the turning over to them of the said promissory note, and of the allowing them to retain the said

sum of \$25,750.00 were all void, illegal, contrary to law and in violation of the rights of said corporation and of this plaintiff, as a stockholder thereof; and that the further acts of the said board of directors in purporting to declare and attempting to declare the said dividend of \$111.00 per share as a part of the same transaction, under the same agreement by which the said money and note aforesaid were paid to and turned over to the said Albert Steinfeld, were illegal and void and in violation of the rights of said corporation, and of this plaintiff, as a stockholder thereof, and that said dividend was illegally declared and that all money paid thereunder was illegally paid and that the same, at all times, belonged to and is now the property of said defendant, the Silver Bell Copper Company.

33 2. Judgment against the defendant Albert Steinfeld that he do pay to the defendant the Silver Bell Copper Company, the sum of \$145,743.75; the sum of \$103,967.00; the sum of \$33,000.00; the sum of \$27,639.00; the sum of \$25,750.00; the sum of \$111.00; and the sum of \$2,500, making a total of \$338,710.75, with interest thereon from the 10th day of January, 1904, at the rate of 6 per cent. per annum.

3. That the defendant J. C. Curtis pay to the defendant the Silver Bell Copper Company, the sum of \$18,870.00, with interest thereon from the 10th day of January, 1904, at the rate of 6 per cent. per annum.

4. That defendant Mammoth Copper Company pay to said Silver Bell Copper Company all money it may have received under or by reason of any of the wrongful acts above alleged and set out.

5. That defendants Steinfeld, Curtis, Shelton and Mammoth Copper Company do severally and collectively account and pay to said Silver Bell Copper Company any and all money they severally or collectively may have received for or for the benefit of said Silver Bell Copper Company, or which they may have received wrongfully and illegally from said Silver Bell Copper Company; to that end a full and complete accounting be had by and from each and all of said defendants (other than said Silver Bell Copper Company) in favor of and to said Silver Bell Copper Company;

34 6. Judgment, in favor of this plaintiff and against the said Silver Bell Copper Company, that the said Silver Bell Copper Company pay to and reimburse this plaintiff for all of the expenses of this action, including such costs and attorneys' fees as he shall have paid and expended up to the close of the trial of this action and that said Silver Bell Copper Company pay to the said above-named attorneys such further and additional sum as attorneys' fees as this court shall deem equitable, right and just in the premises, and that each and all of the other defendants pay to the said Silver Bell Copper Company, the costs of this action;

7. That a receiver be now appointed by this court to take charge of and receive all of the moneys, books, papers and other assets of said corporation to hold the same for the benefit of said corporation for its creditors and its stockholders that the same may be hereafter disbursed, paid out and distributed as to this court may seem right, meet and proper and in accordance with equity and

good conscience and the rights of all parties interested therein;

35 8. For such other and further relief in the premises as to the court may seem right and proper.

E. A. MESERVE,

HEREFORD & HAZZARD,

Attorneys for Plaintiff.

Verified January 27, 1904, by Louis Zeckendorf.

SCHEDULE EXHIBIT A.

List of properties sold by the Silver Bell Copper Company to Imperial Copper Company on May 20, 1903: Mammoth Copper, Berbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John E. Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton Baltimore, Maggie, Silver Bell, Swansea Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hibla, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, and Enterprise, also all other mining claims, mill sites and locations, which said parties of the first part, or either of them, or they or any representatives have, or possess, in said Silver Bell mining district, and not above enumerated; also all the prop-

erty and plant, machinery, appliances, supplies, store goods,
36 live stock and everything at present belonging to said mining claims and which is the property of either of said Silver Bell Copper Company, or said Mammoth Copper Company.

Answer as Amended.

Title of Cause.

I.

Defendants deny that prior to the 20th day of May, 1903, three hundred shares or any of the stock of the Silver Bell Copper Company were purchased by the said company, the same being taken in the name of Albert Steinfeld, trustee or otherwise or at all or that at all or any times after said alleged purchase the said Albert Steinfeld held said stock or any thereof in his possession as trustee as the property of or for the benefit of said corporation, or that long prior to the said 20th day of May, 1903, or at any time the actual outstanding stock of said corporation had been seven hundred shares or any less than one thousand shares, or that one share of the stock standing upon the books of the company in the name of R. K. Shelton is in fact the property of Albert Steinfeld, or that said

Shelton, as a matter of fact, has no interest of property therein,
37 and alleges that on the 9th day of December 1903, the said Shelton became the owner of one share of said stock and ever since has been and now is the owner thereof.

Defendants deny that the Mammoth Copper Company is an instrument in the hands of Albert Steinfeld, used by him for the purpose of covering up any alleged or intended frauds or illegal transactions.

II.

The defendant Shelton denies, and the other defendants deny upon information and belief, that the defendant Shelton at all or any of the times mentioned in the complaint has been the representative of said Albert Steinfeld on said board of directors of the said Silver Bell Copper Company, or that during said times, he has voted or ordered, directed or requested by said Albert Steinfeld and not otherwise; and allege that said Shelton has at all times voted as a director independently and as he believed for the best interests of said corporation.

The defendant Curtis denies, and all of the other defendants upon information and belief deny, that the defendant Curtis during all or any of the times in the complaint mentioned was under the control or direction of the said Albert Steinfeld or as director of said corporation, at all times, did what the said Albert Steinfeld directed, and at no time under no circumstances did any act, 38 take any vote or cast any ballot except as requested or directed by the said Albert Steinfeld, and alleges that said Curtis has at all times voted as a director independently and as he believed for the best interests of said corporation. And the defendants deny that the said Albert Steinfeld was at all or any of the times in the complaint mentioned, in fact, by reason of his alleged control of the other two members of the said board, in absolute control or direction of the board of directors of the above corporations and the defendants deny that all or any acts, things or votes taken by said board since the 20th day of May, 1903, and up to and including the date of the filing of the complaint were taken by or under the direction of the said Steinfeld or at his request and not otherwise; and deny that all votes, motions, resolutions or other acts of said board adopted, passed or done by it, were done by or under the direction of or control of the said Albert Steinfeld and not otherwise, and allege that all acts, things and votes taken by said board, and all motions, resolutions and acts of said board were the independent acts thereof with a view to the best interests of the corporation.

The defendants deny that because of any facts it will be, or would have been an idle or useless act for the plaintiff to make demand on the said board of directors to bring action for the recovery 39 of property belonging to the said corporation, or for the payment to said corporation of any debt owing by any or either of the parties hereto to said corporation, or that any such action, if brought in the name of said corporation would not be prosecuted in good faith or with full intent or purpose that full recovery should be had thereon for the benefit of said corporation or of the plaintiff as a stockholder thereof.

III.

The defendants admit that on and prior to the 20th day of May, 1903, and at the time of the making of the sales in the complaint mentioned, the said defendant corporation, the Silver Bell Copper Company, was the owner of certain property in the Silver Bell mining district, County of Pima, Territory of Arizona; and that some of the property set forth in schedule "A," annexed to the complaint, at said time belonged to the said corporation; but deny that all of the property in said schedule exhibit "A" set forth at said time, belonged to the said corporation; and allege that those certain mining claims mentioned in said Exhibit "A," known as the Silver Bell or English group of claims were at all times the property of the said Albert Steinfeld and the Mammoth Copper Company, and that the said claims so belonging to the said Mammoth Copper Company are as follows:

40 Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie Northern, Yankee, Olympia, Strip, Mollie, El Poso, Fraction, Anita, Queen, Enterprise.

The defendants deny that on or about the 20th day of May, 1903, or at any time during the year 1903, the said Albert Steinfeld presented to the said corporation, the Silver Bell Copper Company, a proposition or offer wherein he stated that said Albert Steinfeld and the said Mammoth Copper Company claimed some rights in some of the properties described in said Schedule Exhibit "A," and offering or agreeing to sell all or any of said interest to the said Silver Bell Copper Company for the sum of \$18,117; or for any other sum, and allege that the said Steinfeld did on or about said day, make a certain offer to the said Silver Bell Copper Company, and that the said offer is not correctly set forth in the said complaint; and deny that the alleged offer set forth in the complaint was by resolution of the board of directors of the said company accepted by the said Silver Bell Copper Company.

41 The defendants deny that on or about the 20th day of May, 1903, or at any time, the Silver Bell Copper Company, sold to the Imperial Copper Company, a corporation, all or any of the properties described in said schedule Exhibit "A" for the agreed price of \$515,000; and allege that on or about the said date the said Silver Bell Copper Company and the said Albert Steinfeld did sell to said Imperial Copper Company certain properties, some of which belonged to each of them, for the full sum of \$515,000.

Defendants deny that any money was paid or note or notes given to or received by the Silver Bell Copper Company for or on account of the said sale; and allege that all moneys or note or notes paid on account of the said sale were paid to the Silver Bell Copper Company in pursuance of a certain agreement, bearing date of May 20th, 1903, between the said Silver Bell Copper Company and the Mam-

moth Copper Company and Albert Steinfeld, which said agreement provided for the disposition of the said purchase price.

The defendants admit that the sum of \$18,117 was paid to Albert Steinfeld and the Mammoth Copper Company out of the proceeds of the said sale, and deny that said or any sum was paid to or received by said Steinfeld as or for the purchase price of the interest of Steinfeld and the Mammoth Copper Company in the properties sold to the Imperial Copper Company; and allege that the said sum was paid as the consideration of the said agreement between the said three defendants as aforesaid.

IV.

The defendants allege that the paper set forth in paragraph IV of the complaint and described as "A memorandum in writing denominated 'An agreement,'" is the agreement referred to in the last paragraph of this answer; and the defendants deny the interpretation of the said agreement in paragraph IV of the complaint contained, and will produce the said agreement upon the trial of this action and refer thereto.

The defendants admit that a substantial copy of the said agreement was spread upon the minutes of the meeting of the board of directors held on the 20th day of May, 1903; and deny that the same was done under the order, direction or control of said Steinfeld, or that said Steinfeld controlled, directed or managed the other two directors.

Defendants admit that the board of directors of the said Silver Bell Copper Company held a meeting on the 26th day of December, 1903, and passed a certain resolution wherein the said agreement was rescinded; and allege that said resolution as passed by the board is spread in full upon the minutes of the company; and the defendants deny that said board did not purport to rescind any other of the transactions of the said 20th day of May, 1903, or particularly did not purport to rescind the transaction or contract by which the Silver Bell Copper Company became entitled to the entire consideration price paid by the Imperial Copper Company as aforesaid, for the sum of \$18,117; and the defendants will produce upon the trial of this action the original book of the minutes of the meeting of the stockholders and of the directors of the Silver Bell corporation and refer to the same, and make the same a part of this answer.

Defendants deny that the defendant Curtis, as treasurer of said company at any or all times acted for or under the control or management of the said Albert Steinfeld; and the defendants further deny that the board of directors of the Silver Bell Copper Company on the 10th day of January, 1904, adopted any resolution whatsoever, or that the said directors at any time adopted any resolution wholly under the control of the said Albert Steinfeld, or under his direction or management as an act prepared by or for him; or that the action of the directors of the said company in paying to the said Albert Steinfeld any note or moneys was without right or that the said Albert Steinfeld at any time appropriated to his own use any

funds of the said Silver Bell Copper Company or any funds or note belonging to the said Silver Bell Copper Company.

Defendants deny that both of the notes referred to on page 9 of the complaint, were at the time of the passing of the said resolution on the 10th day of January, in the hands of Albert Steinfeld or were kept by him or were in his possession or control or that no delivery of the said note given to Albert Steinfeld by the Silver Bell Copper Company as aforesaid, was ever made by the said Silver Bell Copper Company.

V.

Defendants deny that the directors of the Silver Bell Copper Company sold the notes as in paragraph "V" of the complaint alleged, acting under the management or control of the said Steinfeld; and deny that the said Steinfeld sold or discounted both of the said notes, or that the said note of the Silver Bell Copper Company was discounted without the consent or knowledge of any of the officers of the Silver Bell Copper Company other than the defendant Steinfeld.

VI.

Defendants admit that on the 20th day of January, 1904, the directors of the Silver Bell Copper Company passed a resolution declaring a dividend of \$111 upon each of the 1,000 shares of the capital stock of the said company, and that the said Albert Steinfeld received the dividend upon the said 300 shares of stock purchased from the said Nielsen as aforesaid; and deny that the said stock stood in the name of Albert Steinfeld, as trustee, for the benefit or as the property of the said Silver Bell Copper Company; and deny that the said Albert Steinfeld being solely in control of the said defendant corporation, the Silver Bell Copper Company, caused to be paid to him the sum of \$33,000, or that he caused to be paid to him the further sum of \$27,639, or that he caused to be issued to the said R. K. Shelton a check for \$111; and allege that the said sums were paid by the treasurer of the said company to the said Albert Steinfeld, and to the said R. K. Shelton in pursuance of a resolution of the board of directors and in the fulfillment of his duty as treasurer.

All of the defendants except J. N. Curtis, deny, and the said J. N. Curtis denies upon information and belief, that the said check for \$111 delivered to R. K. Shelton was thereafter turned over to Albert Steinfeld or the proceeds paid to Albert Steinfeld or appropriated by him to his use.

The defendants deny that the defendants Shelton and Curtis agreed to pass any resolution whatsoever declaring any dividend, or that the resolution referred to declaring a dividend was a part of any other transaction or that it was agreed that there should be paid to Curtis the sum of \$111, per share on the 170 shares standing in his name on the books of the company, or that in passing the said resolution the said Curtis and Shelton or either of them acted under the control, direction or management of the said Steinfeld; and allege that the resolution was passed by the

directors for the benefit of the stockholders of the corporation without any agreement or consideration whatsoever, and that the \$18,870. paid to Curtis was paid to him as the proper dividend upon the stock belonging to him and in pursuance of the said resolution.

Defendants deny that any moneys paid to Curtis or to Steinfeld or to Shelton were paid under any alleged agreement or arrangement entered into at any time whatsoever, or in particular at the time when the sum of \$145,743.75 was paid to Steinfeld, or the note for \$100,000 was turned over to him; or that any or all of said acts were done under or as a part of any contract, transaction or agreement, or that the said sum of \$18,870 was paid to the said Curtis in consideration for his agreeing that Steinfeld should be paid the sums or for any consideration whatsoever.

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VII.

Defendants deny that the Silver Bell Copper Company at any time executed a bond releasing the attachment levied in the action against the Silver Bell Copper Company brought by S. M. Franklin and referred to in paragraph VII of the complaint, or releasing the sum of \$51,500 garnished in said action in the hands of Steinfeld by said Franklin; or that the said Steinfeld claiming to be the owner of one-half of any sum whatsoever appropriated to his own use the sum of \$25,750 or any other sum.

VIII.

The defendants deny that the said Steinfeld subsequent to the 20th day of May, 1903, and prior to the 10th of January, 1904, having in his possession all of the money from time to time received by the Silver Bell Copper Company on said purchase price, used said money or any thereof for his own benefit, or loaned said money or any thereof to others. Or that the said Steinfeld realized on any money alleged to have been used by him belonging to the said Silver Bell Copper Company, a sum in excess of \$2,500 or any sum whatever.

IX.

48 The defendants have no knowledge or information sufficient to form a belief as to the allegation in paragraph "IX" of the complaint contained, and therefore deny the same.

X.

Defendants deny that at any of the times mentioned in the complaint or any time whatever, the defendants acting as directors of the said Silver Bell Corporation, or in any capacity, attempted to divert from the funds of said corporation the sums mentioned in the complaint as paid to Steinfeld, Shelton and Curtis or any sum whatsoever; or that any or either of the defendants at any time knew that Steinfeld or the defendant, the Mammoth Copper Company, had no right, title, interest or estate in or to any of the properties described in schedule "A" annexed to the complaint; or knew that the said Mammoth Copper Company or Albert Steinfeld had no

right to any money or property of the said Silver Bell Copper Company except such as Albert Steinfeld might have been entitled to by reason of his ownership of 250 shares of stock of the said company; or that the said parties knew that the payment to the said Steinfeld of the sums of money in the complaint set forth and the delivery to him of the said note or either of said acts, was in violation of any right of the said corporation or of the plaintiff; or that the said acts of the defendants were done for the purpose of robbing the said corporation or of misappropriating or stealing its funds, or for the sole or only purpose of enabling the said Steinfeld to rob or steal from the plaintiff the share of the properties of the corporation which otherwise would be coming to the plaintiff as the owner of 250 shares of stock of said company or any share whatsoever; or that the defendants knew that they had no right to declare the said dividend of \$111 per share, the same being declared as a part of any alleged transaction or said part of any alleged agreement whereby any moneys or notes were misappropriated or that the said parties knew that in the declaration of said dividend and in the payment of the said moneys thereunder they or either of them were violating their duties as directors of the said corporation or the duty or duties of any or either of them as such or were using the position of any or either of them as directors to enable any or either of them or the said Steinfeld to appropriate to his own use wrongfully, illegally or in violation of the rights of this corporation or of this plaintiff the funds or property of this corporation.

Defendants deny that the Silver Bell Copper Company now has no other property except that which is shown by the complaint to be left in the treasury of the said corporation, or that said property consists of money which the said directors illegally, unlawfully or inequitably are trying to force upon the plaintiff as his share of the visible proceeds of the sale of the properties of the corporation.

Defendants deny that Curtis and Shelton or either of them are under the control or management of the said Steinfeld or that any moneys of the said corporation have been illegally diverted, misappropriated or stolen from the said corporation in any manner whatsoever, or that said Steinfeld has control of the money or properties of the said corporation now remaining, or will misuse such alleged power or will misappropriate or wrongfully divert or convert the funds or property of the said corporation in any manner whatsoever, or that there is any necessity whatsoever for the appointment of a receiver of the said corporation.

Wherefore the defendants demand that the plaintiff recover nothing by reason of this action, and that the defendants recover their costs against the plaintiff.

SMITH & IVES,
FRANCIS J. HENRY,
Attorneys for Defendants.

Verified February 29, 1901, by Albert Steinfeld.

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Findings.

[Title of Cause.]

This cause coming on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof presiding, sitting without a jury (a jury having been theretofore regularly waived by all parties) on the 16th day of May, 1905, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and due course and form argued to the Court and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises the court now finds the following to be the facts in the case:

I.

That the defendant, the Silver Bell Copper Company, is now and for all the times herein mentioned has been a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the city of Tucson, County of Pima, in said Territory; that for all

52 the times herein mentioned, defendants Albert Steinfeld, J. N. Curtis and R. K. Shelton have been and now are the directors of said corporation, all of said parties being residents of said city of Tucson, County and Territory aforesaid.

That plaintiff for all of the times herein mentioned has been and now is a stockholder of said corporation, and he is now and for all of the times herein mentioned has been a resident of the city of New York, State of New York.

That the entire capital stock of said corporation was divided into one thousand shares, all of which said one thousand shares was originally issued by said corporation for value, in accordance with the laws of the said Territory of Arizona.

II.

That some time during the year 1900, the said Albert Steinfeld purchased 300 shares of said stock, theretofore belonging to one Carl Nielsen, from the said Carl Nielsen, and thereafter on the 13th day of January, 1901, a new certificate in lieu of the certificates purchased by the said Albert Steinfeld was issued for said 300 shares of stock to said Albert Steinfeld, the same being taken in his name as trustee. That on May 20th, 1903, said Albert Steinfeld held said

53 stock in his possession, and in his name as trustee for the Silver Bell Copper Company, and as the property of and for the benefit of said Silver Bell Copper Company, and said 300 shares of stock on the said 20th day of May, 1903, was, and ever since has been the property of said corporation.

That not deeming the same material, the court does not find on

the issues raised by the pleadings as to the beneficiary ownership of said stock, prior to May 20th, 1903, because and for the reason that an agreement was entered into between said Albert Steinfeld and the said Silver Bell Copper Company on said 20th day of May, 1903, by which the beneficiary ownership of said stock was established in said Silver Bell Copper Company, and by which it was established that said Albert Steinfeld then and thereafter held the same in his name as trustee for said corporation and for its use and benefit, and as its property.

On said 20th day of May, 1903, and thereafter, the actual outstanding stock of said corporation was and has been 700 shares divided, owned and held as follows: By L. Zeckendorf and Company, 500 shares; by Albert Steinfeld, trustee for J. W. Zeckendorf, 30 shares; by J. N. Curtis, 170 shares. That of the 500 shares belonging to the said firm of L. Zeckendorf and Company, one share stood in the name of R. K. Shelton, the said R. K. Shelton at that time, however, having no interest nor ownership therein. That the
 54 said R. K. Shelton, prior to the commencement of the trouble resulting in this litigation, and prior to the 9th day of December, 1903, in fact was but a stockholder in name only of the said one share of stock standing in his name, and said R. K. Shelton in fact had no interest therein; that said one share of stock, prior to the 6th day of June, 1903, was the property of the firm of L. Zeckendorf and Company, of which said Albert Steinfeld was at all times the active manager; That on the 6th day of June 1903, the stock in the said Silver Bell Copper Company, belonging to said firm was divided by Albert Steinfeld between Louis Zeckendorf and Albert Steinfeld, one half to each, said Albert Steinfeld taking over the ownership as part of the stock coming to him, the said one share so standing in the name of said R. K. Shelton, and such condition thereafter continued until the 9th day of December, 1903, when said Albert Steinfeld, without any consideration whatsoever, but as a free gift, presented said one share of stock to said R. K. Shelton, that said R. K. Shelton for the first time being put in possession of the certificate for said one share of stock; that the said R. K. Shelton never had any other or different interest in said Silver Bell Copper Company.

III.

That the said Mammoth Copper Company is now and for
 55 all the times herein mentioned has been a corporation organized and existing under the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima County, said Territory; that the defendant, Albert Steinfeld, is now, and for all the times herein mentioned, has been the owner in fact of all of the capital stock of said Mammoth Copper Company; that any stock standing in the name of any other party in order to enable him to qualify as a director is simply held by the said party for that purpose, and the same belongs to and is in fact the property of the said Albert Steinfeld, and the said Mammoth Copper Company is, and at all times was, but an instrument in the hands of the defendant

Albert Steinfeld, used by him for the purpose of transacting business for himself not in his own name; that any money, which may, on its face, have been paid to the defendant Albert Steinfeld, and any property which may, on its face, have been delivered to the said Albert Steinfeld as hereinafter found, for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company, jointly, in fact and in truth, were paid and delivered to the said Albert Steinfeld and were appropriated by him, to his own individual use.

IV.

That the said R. K. Shelton at all times since the 6th day of June, 1903, and at all meetings of said stockholders or directors of said Silver Bell Copper Company held after that date, and particularly as a director of said corporation, has voted as ordered, directed and requested by said Albert Steinfeld and not otherwise, and at all of said times, as such director, has been under the direction and control of said Albert Steinfeld, and at all times subsequent to the 6th day of June, 1903, said R. K. Shelton has been the representative of the said Albert Steinfeld on the board of directors of said Silver Bell Copper Company, having no interest in said corporation but to carry out and perform the wishes and directions of said Albert Steinfeld; that the said Albert Steinfeld, at all of the times herein mentioned after June 6th, 1903, was in fact, by reason of his control of the other two members of the said board, in absolute control and direction of the board of directors of the said defendant corporation, and all acts, things and votes, taken by said board since said 6th day of June, 1903, and up to and including the present time, were taken by and under the direction of the said Albert Steinfeld and at his request and not otherwise, and all votes, motions, resolutions and other acts of said board adopted, passed or done by it, subsequent to said 6th day of June, 1903, were done by and under the direction of and control of the said Albert Steinfeld, and not otherwise.

V.

That because of the facts herein found, it would have been an idle and useless act for this plaintiff to make any demand whatsoever on the said board of directors to bring any action against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton for the recovery of property belonging to the said corporation, or for the payment to said corporation of any debt owing by said parties, or either of them, and particularly by the said Albert Steinfeld, to the said corporation, and that any such action, if brought in the name of said corporation, would not have been prosecuted in good faith, or with the full intent and purpose that the full recovery should be had thereon for the benefit of said corporation, and of this plaintiff, as a stockholder thereof; and for such reasons and because it would have been idle and purposeless to do so, this plaintiff made no demand whatsoever on said corporation that it bring this action or that it prosecute the same; and this plaintiff brought this action as a stockholder of said defendant corporation

for its use and benefit and the benefit of its stockholders, and in order that its property, illegally taken from it, as hereinafter set forth, may be recovered and restored to its assets.

VI.

That under date of 20th day of May, 1903, all of the properties listed and described in the schedule "Exhibit A" attached to plaintiff's complaint and amended complaint on file herein, were sold to the Imperial Copper Company for the purchase price of \$515,000.00. That the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company joined in the deed of conveyance of said properties: That said purchase price of \$515,000.00 under the terms of the sale thereof, became payable as follows, to-wit: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,000 in four equal payments of \$100,000 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the said Silver Bell Copper Company, each of said notes being dated the said 20th day of May, 1903, and bearing interest from said date of payment thereof, at the rate of six (6) per cent. per annum; that the sum of \$115,000.00 in cash was paid by said Imperial Copper Company to and received by said Albert Steinfeld, as the treasurer of the said Silver Bell Copper Company; that the said four promissory notes, each for \$100,000.00 principal, as aforesaid, were delivered to and received by the said Albert Steinfeld, as treasurer of the said Silver Bell Copper Company.

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VI.

That on the said 20th day of May, 1903, after the said sale was completed, the said Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company, executed an agreement in writing, in the words and figures following, to-wit:

"This agreement, made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property of the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phenix National Bank, of Phenix, Ariz.; and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

60 Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered

into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

Now therefore, in consideration of the premises, and of the sum of One Dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of One Hundred Thousand Dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporations, parties of the first and second part, *has* caused these presents to be signed by *its* President and Secretary, and *its* corporate seal to be hereunto affixed by resolution of *its* board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

That the terms of this agreement, and that it should be executed, were, however, all agreed upon before the said sale was completed, or said money was paid, or said notes executed by the said Imperial Copper Company.

VIII.

The court does not find on the issues raised by the pleadings as to the ownership, legal or equitable, prior to said sale thereof, of the several properties described and listed in said schedule marked "Exhibit A," attached to the plaintiff's complaint and amended complaint on file herein, for the reason that the aforesaid agreement, dated May 20, 1903, in finding VII set out, established the ownership of the entire purchase price of the said property, cash and notes, to be in the said Silver Bell Copper Company. From and after the 20th day of May, 1903, the said Silver Bell Copper Company continued to be the owner of the whole of said purchase price, viz: Said sum of \$115,000.00 paid in cash by said Imperial Copper Company, and said four promissory notes for \$100,000.00 each except as the same was thereafter legally disbursed and paid out as hereinafter found.

IX.

That after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company, paid two of said promissory notes, paying the principal thereof, with interest at said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of the cash paid to the said Silver Bell Copper Company, by said Imperial Copper Company, prior to January 1st, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said "Exhibit A" of the sum of \$319,487.50; that the said sums of money aggregating the said sum of \$319,487.50, were received by the said Silver Bell Copper Company from the Imperial Copper Company, as and for the first cash payment, and as the payments of the promissory notes first falling due on the purchase price of said sale so made to said Imperial Copper Company. That of said sum there was regularly paid out for and on account of certain debts and contracts of the Silver Bell Copper Company, a total of \$118,000.00, including the sum of \$18,117.00 paid to Albert Steinfeld May 21st, 1903.

X.

That on the 26th day of December, 1903, a meeting of the stockholders of the defendant corporation was duly had; all of the stock of the defendant corporation was represented at such meeting, the said Zeckendorf being present in person and being furthermore represented by his attorney, also there in person.

At said meeting a resolution was offered, as follows:

"Resolved: That the agreement executed on May 20th, by the President and Secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, a copy of which is hereto annexed, be and the same hereby is, rescinded, and that the said agreement and the resolution of the directors passed on said day be declared null and void."

(Copy of said agreement of May 20, 1903, above set out, was attached to said resolution.)

The said resolution was unanimously passed, all of the stock of said corporation voting in favor thereof, the said Zeckendorf in person voting 250 shares of the stock of the said corporation in favor of the said resolution.

Said resolution so passed at said stockholders' meeting was not procured by false representation, misconduct or fraudulent practices, but it was manifest to the directors of said corporation and it is a fact that neither the said Zeckendorf nor any other stockholder present in voting for said resolution intended to advise, direct, consent or assent, to a re-cission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper Company became, or might have become, the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company. All of said stockholders of said company understood that the entire controversy, then existing, was with respect alone to the right to the custody of the said purchase price

65 (cash and notes) and that no question of ownership therein or thereof was involved or being raised.

XI.

That on the said 26th day of December, 1903, after the adjournment of said stockholders' meeting, defendant- Shelton, Steinfeld and Curtis held a meeting as a board of directors of said Silver Bell Copper Company, at which meeting the following resolution was adopted, viz:

"Be it resolved:

1. That the said resolutions passed by the directors on the said 20th day of May, 1903, be and the same are hereby rescinded and repealed.

2. That the said agreement heretofore recited in full, be rescinded and declared null and void.

3. That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company, which have not yet matured and to give his proper receipt therefor.

4. That the officers of this company be instructed to execute forthwith and deliver to the said Steinfeld and the Mammoth Copper Company an agreement rescinding the said agreement ab initio; and to do and cause to be done all such things and acts as may be necessary to accomplish and consummate the full rescission of said agreement, and that J. N. Curtis, the president and treasurer of the company be instructed to demand and receive from the Bank of California the said money and notes now held by the said Bank."

That in adopting said resolution neither said board nor any member thereof intended to cancel, rescind or annul any act, agreement or resolution under or by virtue of which the ownership of said entire purchase price of said properties sold to said Imperial Copper Company became fixed in said Silver Bell Copper Company, but said board and the several members thereof intended only by said resolution to provide that the custody of said notes and money should be placed in the treasury of the said Silver Bell Copper Company; that all actions and purported actions by the stockholders or directors of the said Silver Bell Copper Company taken on said 26th day of December, 1903, had reference alone to the custody and not to the ownership of said money, notes and funds.

XII.

That thereafter and without further action whatsoever, by the said Silver Bell Copper Company, and without any stockholder of the said company, other than said Curtis, Steinfeld and Shelton having any knowledge whatever thereof, or of such intended action the said Steinfeld and Curtis, on the 16th day of January, 1904, purporting to act as a board of directors of said corporation, purported to adopt a resolution, and caused the same to

be spread upon the minute book of the said corporation, wherein and whereby the said parties so acting as aforesaid recited the fact that said Albert Steinfeld and the said Mammoth Copper Company claimed that their interests in the properties, conveyed as heretofore set out to the Imperial Copper Company, were of greater value than were the interests of the said Silver Bell Copper Company therein, and that the said Albert Steinfeld and the said Mammoth Copper Company (of which the said Albert Steinfeld was the sole stockholder) claimed that they were entitled to more than one half of the said purchase price of \$515,000.00 so received by the Silver Bell Copper Company from the said Imperial Copper Company, and thereupon the said Steinfeld, Curtis and Shelton at said purported meeting, and purporting to act as the board of directors of said corporation, and as an act prepared by said Albert Steinfeld and at his request and on his direction, further resolved that the said Silver Bell Copper Company should pay to the said Albert Steinfeld personally and for his own individual use and benefit one half of the cash already received, less

68 one half of the sum of \$28,000.00 theretofore paid by the said Silver Bell Copper Company, as commission and expenses in connection with the making of said sale, and that the said Silver Bell Copper Company should also at the same time, deliver to the said Albert Steinfeld, one of the two of the said promissory notes belonging to said corporation, still remaining unpaid, and in the hands of the corporation; That thereupon, on said 16th day of January, 1904, said J. N. Curtis, as and being then the treasurer of the said Silver Bell Copper Company, having in his possession the cash and the said two notes remaining unpaid, and under no other authority or claim of authority than as hereinabove in this finding set out, paid to the said Albert Steinfeld of the said funds of the said Silver Bell Copper Company, then in the hands of said Curtis as the treasurer of said company, the sum of \$115,743.75 in cash (the same being one half of the said sum of \$319,487.50 less the said sum of \$28,000.00) and delivered to said Albert Steinfeld one of the said two notes then remaining unpaid, and which said money and note said Steinfeld received from said Curtis, treasurer of said Silver Bell Copper Company.

The said note so delivered to said Steinfeld at the time of such delivery was worth the full face value thereof, viz: the sum of \$104,000.00, and which said sum said Steinfeld received and collected on said note.

69 That said Steinfeld on said 16th day of January, 1904, converted said sum of \$115,743.75 and said note to his own personal use and benefit, and not to or for the use or benefit of any other person, firm or corporation. That said Steinfeld, after collecting and receiving on said note the said sum of \$104,000.00 prior to the commencement of this action, converted the said sum to his own use and benefit; that said Steinfeld has not paid back to the said Silver Bell Copper Company or to any other person for it any part of either of said sums or of the interest thereon, nor has the same or any part thereof ever been paid to said corporation or for

it by any person whatsoever, but the whole of both of said sums with the interest thereon remain unpaid.

XIII.

That the said board of directors of said Silver Bell Copper Company subsequent to the 10th day of January 1904, and prior to the 20th day of January, 1904, sold the other of said two promissory notes remaining unpaid, receiving thereon on account of the principal and interest thereof, a total of \$103,967.00, which said sum was paid into the treasury of the said Silver Bell Copper Company.

70

XIV.

That on the 20th day of January, 1904, the directors of the said Silver Bell Copper Company passed a resolution, declaring a dividend of \$111.00 per share on the capital stock of said Silver Bell Copper Company. Said Albert Steinfeld thereupon collected and received from the treasurer of said corporation the sum of \$111.00 per share as such dividend on the 300 shares of stock belonging to said Silver Bell Copper Company, standing in his name as trustee, as aforesaid, receiving as such dividend on said stock the sum of \$33,300.00, and which said sum the said Albert Steinfeld thereupon converted to his own use and benefit and not to the use or benefit of any other person or corporation whatever, and the same has not, nor has any part thereof, been paid to or for the Silver Bell Copper Company, but the whole thereof with interest from the 20th day of January, 1904, at the rate of 6 per cent. per annum remains unpaid. That the said dividend of \$111.00 per share on said 300 shares was paid to the said Albert Steinfeld because of and on account of his control of said corporation. That said money received by said Albert Steinfeld as such dividend on said 300 shares of stock was the money and property of said Silver Bell Copper Company, and said Albert Steinfeld had no right thereto, and had no right to receive the same and convert the same to his own use. That said dividend

71 (except as to said 300 shares of stock standing in the name of Albert Steinfeld as trustee) was regularly declared; That R. K. Shelton was paid and received the sum of \$111.00 on such dividend, being the dividend on the one share of stock standing in his name; That said J. N. Curtis was paid and received the sum of \$18,870.00, being the dividend on 170 shares standing in his name; That said Albert Steinfeld in addition to said \$33,300.00 was paid and received the sum of \$27,939.00, being the dividend on the 249 shares standing in his name and belonging to him. That plaintiff has now been paid and has received the sum of \$27,750.00, being the dividend on 250 shares.

XV.

That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company, for the sum of \$51,500.00, and in said action garnished the sum of \$51,500.00, for property of the

said Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled "S. M. Franklin, plaintiff, vs. Silver Bell Copper Company," Defendant," and was brought in this Court. That after said garnishment was levied on said

72 Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750.00 of said \$51,500.00, in his hands retaining the other \$25,750.00 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain said \$25,750.00 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of said \$25,750.00, so left in his hands as security, after deducting the money so paid to him said S. M. Franklin.

The said Albert Steinfeld thereafter continued to hold and now holds said sum of \$25,750.00 as such security, the same being the property of the said Silver Bell Copper Company.

XVI.

On the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to the said company except the sum of \$51,500.00 which had been garnished in his hands in a suit

73 pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said treasurer of the said corporation an order upon the Bank of California authorizing and requiring the said Bank to deliver to the said corporation or its duly authorized officer the said money and notes so deposited by him as aforesaid, and the same were, after December 25th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld.

XVII.

That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700.00, for the benefit of said Silver Bell Copper Company. That on the 23rd day of January, 1904, said Albert Steinfeld paid to Mary Neilsen the sum of \$10,000.00, for the benefit of the said Silver Bell Copper Company. That on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day, said Albert Steinfeld paid to J. N. Curtis, treasurer of the said Silver Bell Copper Company, the sum of \$18,117.00.

74 That said Albert Steinfeld is entitled to a credit of said sums on the amounts above found to be wrongfully taken by him from said corporation on the 16th day of January, 1905.

XVIII.

That the sum of \$15,000.00 is a reasonable sum to be allowed plaintiff out of the funds recovered as the result of this action, by the said Silver Bell Copper Company, as and for attorneys' fees for the bringing of this action, and the prosecution of the same up to and including the entry of judgment thereon.

As conclusions of law from the foregoing facts, the court finds and concludes as follows, to-wit:

That Louis Zeckendorf, the plaintiff in the above entitled action, is entitled to judgment against defendants in said action.

First. That at no time after May 21st, was the Silver Bell
75 Copper Company indebted to Albert Steinfeld or to the Mammoth Copper Company in any sum whatever, and that neither on the 10th, 16th or 20th day of January, 1904, or at any time between or subsequent to said dates, did either the said Albert Steinfeld, or the said Mammoth Copper Company, have any account whatsoever against the said Silver Bell Copper Company or any claim against the said Silver Bell Copper Company, except as to and for the \$12,700.00 paid to Volkert and Francis; \$10,000.00 paid to Mary Neilsen, and the \$18,117.00 paid to the said J. N. Curtis, treasurer, as in finding 17, above stated, *or any claim against the said Silver Bell Copper Company, except as to and for the \$12,700.00, paid to Volkert and Francis; \$10,000.00 paid to Mary Neilsen, and the \$18,117.00 paid to the said J. N. Curtis, treasurer, as in finding 17 above stated.*

Second. That the defendant Albert Steinfeld pay to the defendant the Silver Bell Copper Company, and that said Silver Bell Copper Company do have and recover of and from the said Albert Steinfeld the sum of \$266,450.15, with interest thereon from the 16th day of September, 1905, at the rate of six per cent per annum, and that said plaintiff do have execution for the said sum of \$270,531.15, and such interest thereon from said date, against the said Albert Steinfeld,
76 the recoveries thereon to be paid to the defendant, the Silver Bell Copper Company, or to the receiver of the said company to be appointed, as hereinafter provided.

Third. That the plaintiff do have and recover of and from defendant Albert Steinfeld his plaintiff's costs in this action herein taxed in the sum of \$— and that plaintiff do have execution in his favor and against said defendant therefor.

Fourth. That plaintiff out of the said money recovered and to be recovered by the said Silver Bell Copper Company from said Albert Steinfeld, do have and be paid the sum of \$15,000.00 as an allowance for and as attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of judgment thereon; the receiver hereinafter named and hereinafter appointed is hereby instructed to pay said sum of \$15,000.00 out of said money of said plaintiff in case of appeal or new trial of this action plaintiff to be allowed such other and further sum or sums as and for attorneys' fees as may hereafter be fixed.

Fifth. That Albert Steinfeld holds the sum of \$25,750.00 money

of said Silver Bell Copper Company, in his hands and for the security to him against any liability on account of the garnishment levied on him as aforesaid in said action of Franklin vs. Silver Bell
 77 Copper Company; said Steinfeld to account to the said receiver of the said corporation hereafter appointed, for said sum immediately upon the final determination and settlement of said action; and to pay to the said receiver any balance of said sum there may be left remaining after deducting therefrom such sums if any that said Steinfeld may pay or may have paid said Franklin on account of said garnishment, in the event that Franklin should recover in the said action.

Sixth. That a receiver be appointed in this action by this Court of all property, money, books, papers and assets of every kind and character of said Silver Bell Copper Company; said receiver upon being appointed and qualifying, to take immediate possession of all money, property, books, papers and other assets of every kind and character of said Silver Bell Copper Company and to pay, distribute and disburse the same as this court herein and from time to time hereafter may order and direct; Hiram W. Fenner to be appointed such receiver and to give and execute a bond in the sum of \$275,000.00 in the usual form of receiver's bonds, to be approved by this court for the faithful performance of his duties as such receiver.

Seventh. That upon the final termination of this action said Silver Bell Copper Company be dissolved, all its debts and liabilities paid and discharged, and all property, money and
 78 assets then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock, the same to be done and accomplished by order of this Court for that purpose hereafter made and to be made in this action.

Let judgment be entered accordingly.

Dated this 16th day of September, 1905.

JOHN H. CAMPBELL, *Judge*.

Judgment.

[Title of Cause.]

Be it remembered That the above entitled cause came on regularly for trial on the 16th day of May, 1905, before the Court, sitting without a jury, Honorable John H. Campbell, presiding. Plaintiff appeared by his attorneys, Edwin A. Meserve, Esq., and Messrs. Hereford & Hazzard; defendants appeared by their attorneys Eugene S. Ives, Esq.; and Francis J. Heney, Esq. Witnesses were duly sworn on behalf of plaintiff and on behalf of defendants and
 79 gave their testimony and documentary evidence on behalf of the respective parties was received by the Court, and the evidence being closed, the case was argued by the counsel and submitted to the Court for its consideration and decision; and the Court having duly considered the same and being fully advised in the premises, filed his decisions in writing, herein, dated the 16th day of September, 1905, wherein the Findings of Fact and Conclu-

sions of Law are separately stated and wherein the Court finds that the plaintiff is entitled to judgment the defendant in accordance with the conclusions of law as therein set forth.

Wherefore by virtue of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed and this Court does hereby order adjudge and decree:

First. That Albert Steinfeld, the defendant, in the above entitled action, pay to the defendant, the Silver Bell Copper Company, and that the said Silver Bell Copper Company, do have and recover from the said Albert Steinfeld the sum of \$266,450.15, with interest thereon at the rate of 6 per cent, per annum from the 16th day of September, 1905. That said plaintiff do have execution for the said sum of \$266,450.15, and interest thereon from said date, against the said Albert Steinfeld, the recoveries on said execution, to be paid to the defendant, the Silver Bell Copper Company, or to the receiver of said Company to be appointed, as in this judgment provided.

80 Second. That Louis Zeckendorf, plaintiff in the above entitled action, do have and recover of and from Albert Steinfeld his plaintiff's costs in this action, herein taxed in the sum of \$— and that plaintiff do have execution in his favor and against said defendant therefor.

Third. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the Silver Bell Copper Company the sum of \$15,000.00 as and for Attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$15,000.00 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld.

Fourth. That Albert Steinfeld holds the sum of \$25,750.00 money of said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin vs. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the
81 receiver of said corporation hereafter appointed, for said sum immediately upon the final determination and settlement of said action; and to pay to said Silver Bell Copper Company to said receiver any balance of said sum there may be left remaining after deducting therefrom such sums, if any, that said Steinfeld may pay or may have paid said Franklin on account of said garnishment, in the event said Franklin should recover in said action.

It is further ordered, adjudged and decreed and the Court does hereby order that Hiram W. Fenner be and he is hereby appointed receiver of all property, money, books and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver, the same to be held by the

said receiver and retained and kept in possession, and to be distributed, paid out and disbursed upon the orders of this Court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute a bond in the sum of \$275,000.00 in the usual form of receiver's bond, to be approved by this Court, for the faithful performance by him of his duties, as receiver; and the said Hiram W. Fenner, as such receiver immediately upon the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take

82 immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this Court from time to time hereafter.

It is further ordered, adjudged and decreed that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged, and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

The said dissolution, payments, disbursements and distributions to be done and accomplished by orders of this Court for that purpose in this action made and to be made.

Done in open Court this 16th day of September, 1905.

JOHN H. CAMPBELL, *Judge*.

83

Motion for New Trial.

[Title of Cause.]

Nom come the defendants and move for a new trial upon the following grounds:

I.

That the court erred in admitting evidence.

II.

That the Court erred in rejecting evidence.

III.

That the evidence does not sustain the judgment.

IV.

That the judgment is contrary to law.

Dated, Tucson, Arizona, September 19, 1905.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for Defendants.

84

Amended Motion for New Trial.

[Title of Cause.]

Now come the defendants and amend their motion for a new trial and move for a new trial upon the grounds in the motion heretofore filed and upon the further grounds that the Court failed to find upon certain material issues raised by the pleadings and failed to find certain material facts, among others that the defendant Albert Steinfeld purchased the Silver Bell group of mines and the 300 shares of stock for his own use and benefit, and not for the benefit of the Silver Bell Copper Company.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for Defendants.

Testimony.

LOUIS ZECKENDORF being called on behalf of the plaintiff, testified as follows:

85 Direct examination by Mr. MESERVE:

I was the senior partner of the firm of L. Zeckendorf & Co., Albert Steinfeld was my only partner. He is my sister's son. Prior to the time that Steinfeld became interested in that business, I had been connected with it possibly 17 years. I knew Carl Nielsen during his life time. I know the property called the Mammoth mine or the Old Boot mine. I know the circumstances surrounding the incorporation of the Nielsen Mining and Smelting Company. I received my information from Albert Steinfeld. My residence during all the time since and before the incorporation of the Nielsen Mining and Smelting Company up to and including the present time has been in New York City.

Albert Steinfeld resided during all these times in Tucson, Arizona. Albert Steinfeld had the active control and charge of the business in Tucson and in Arizona of the firm of L. Zeckendorf & Company. When I first knew Nielsen it was before 1898. I was out here and Nielsen had an option or the privilege of taking ore out from the Old Boot mine, which belonged to my sister-in-law, and he was paying \$1.25 royalty for all the ore he was taking out. He kept on that way for a number of years I think, and finally Mr. Steinfeld informed me that Nielsen had an option on a number of prop-
86 erties and the privilege of taking out ore in the same manner as he was taking out of the Old Boot and he had an old smelter at the Omega and he sold it to Nielsen on credit; I believe the amount was \$2,000, and he said that he was going to supply him with things that he needed for development and working this mine, and that we, L. Zeckendorf and Company, were to handle the product of the Nielsen Company. This matter went on for quite a while, but there was very little copper produced, and from time to

time I heard of it and that Nielsen's account was growing rapidly. I heard this from Albert Steinfeld, and I got then a letter subsequently from Albert Steinfeld saying that he wanted to protect our interest with Nielsen and that he had concluded to incorporate the Nielsen Mining and Smelting Company, that Nielsen was to own half of the stock and L. Zeckendorf & Co. the other half. Subsequently I got a letter from Albert Steinfeld saying that he had incorporated, but had made a change in regard to the division of the stock, and that L. Zeckendorf & Co. now owned in that mine three-eighths, Curtis two-eighths and Nielsen three-eighths, making 100 per cent. The company was incorporated and the stock was issued—1,000 shares of the par value of one dollar. That was the first incorporation of the Nielsen Mining Company. The product of the

mine was forwarded to me at New York, and I realized on it
 87 and turned it over to the account of the Tucson business crediting the amount or charging it, as the case might have been, to L. Zeckendorf & Co., in Tucson. I had no direct account with Nielsen; it was all from the Tucson business.

I handled the product in New York and charged it as the business of L. Zeckendorf & Co.—charged it to the Tucson business of L. Zeckendorf & Co. There was existing an account between the New York firm of L. Zeckendorf & Co. and the Tucson firm of L. L. Zeckendorf & Co. I left it to the Tucson end to determine the matter as between L. Zeckendorf & Co. and the Nielsen Mining and Smelting Company. Albert Steinfeld had the management of that. After the Nielsen Mining and Smelting Company was incorporated I came here February 8, 1899.

I think I wrote out the original certificates of stock that were written out in the stock book. I can tell by the stubs and by that copy. It appears by the stub that I did so on May 8, 1899. Prior to that time I had conversation with Albert Steinfeld, Mr. Curtis and Mr. Nielsen with reference to the ownership of that stock and the relative proportions in which it should be issued. As I stated before the shares were divided so that L. Zeckendorf & Co. owned $\frac{3}{8}$; Curtis, or rather Nielsen $\frac{3}{8}$; and 2-8 to Curtis. At that time before these stocks

were issued we got an option of William Zeckendorf in behalf
 88 of his wife to purchase the Old Boot for \$25,000, on the installment plan: being \$2,500 cash down, and \$2,500 every three months. That was left in escrow with L. Zeckendorf & Co. to carry out this contract. If L. Zeckendorf & Co., at that time they called it the Nielsen Mining Company, had failed to carry out this agreement which was made, the property was to return to William Zeckendorf again, or to his wife. After this was accomplished I was not satisfied with the division of the stock. I called on Mr. Steinfeld, and told him, "Look here! we are carrying all the burden of this enterprise and Curtis don't put up one dollar and Nielsen don't put up one dollar, are carrying the whole burden; and suppose that this property is a success then Nielsen and Curtis will come together and freeze out L. Zeckendorf & Co. I want at least, before I turn over this Old Boot to the Nielsen Mining Company I want at least the controlling interest; otherwise I am not satisfied to go into

the enterprise at all." Mr. Steinfeld said that is all right; you go ahead; because everything unpleasant I had to do. I went to work and seen Curtis and went and seen Nielsen and they swore they would not give up their stock. Nielsen said he wanted to have some interest in it and Curtis said: I work for Curtis, give all my labor—
The final agreement was that L. Zeckendorf & Co. were to get 50
89 per cent, or 500 shares out of the 1000; William Zeckendorf got 30 shares; Curtis got 170; Nielsen got 300 shares; that made 1000 shares. I think I issued 529 shares in favor of L. Zeckendorf & Co.; at least I wrote out a stub or the blanks. One share was put in the name of Mr. Shelton to represent himself in the board of directors; it was owned then by L. Zeckendorf & Co. Albert Steinfeld selected Mr. R. K. Shelton to go on the board of directors of the Nielsen Mining and Smelting Company to represent L. Zeckendorf & Co. I did not have anything to do with naming him as a director in the first instance. Only in this way: When this one share was issued in the name of Shelton I said to Mr. Steinfeld: "Now who owns this share?" Well, he said, "Of course that share belongs to us,—L. Zeckendorf & Co." I said, "Suppose Shelton keeps that share." He said, "Shelton is our clerk and he has to do what I tell him." Nielsen agreed to take his 300 shares.

It is admitted that on the day the certificates were issued there was a certificate issued for a thousand shares to Carl Nielsen; that he endorsed the certificate—the same one—529 shares to L. Zeckendorf & Co.; 170 shares to Curtis; Carl Nielsen 300 shares; and R. K. Shelton one share.

And it is admitted that all of these certificates were in the handwriting of Louis Zeckendorf with the exception of the endorsement
90 on the back of Nielsen's certificate which was in the handwriting of Nielsen; and that each of the parties signed receipts for the stock and that the stock remained in the book.

By Mr. Ives:

And on the endorsement of this certificate issued to Carl Nielsen, is the name of William F. Cooper, as a witness, and that certificate had been attached and pasted in again.

I did not come to Tucson in the spring or summer of 1900. I first saw Mr. Steinfeld and had a conversation with him about the Nielsen stock in 1901. I am positive of that.

I don't remember that there was any conversation. I asked for the report of Mr. Curtis; I had seen it before and Mr. Steinfeld handed it to me and I had it copied. On this same trip into Tucson I had conversation with Mr. Steinfeld with reference to the properties of the corporation, with reference to the number of claims which it had. Mr. Steinfeld sent me another report which contained all of the maps; I didn't have any other maps; I think it was a report of a mining engineer named Trost, or something like that. I cannot remember names very well. That is the only map I had. I believe one Prout made the report you refer to. There was another report made by a Mr. Johnson.

91 By Mr. MESERVE: We now offer the report in evidence.
The COURT: It will be admitted, marked the plaintiff exhibit 55.

It was early in the year 1901 that I arrived in Arizona; I cannot tell you exactly; it was in January, early in January. After I arrived here I saw Mr. Steinfeld. He was here in Tucson at that time. I did not have any conversation with him at the time with reference to the Silver Bell properties. No, I never heard of Francis and Volkert at that time. I did have conversations with reference to the Nielsens. The conversation originated about this way. This book here—this stock book was kept in the safe of L. Zeckendorf & Co. I took hold of that book and I found that Nielsen's 300 shares were torn out of this book. I asked Mr. Steinfeld what became of these 300 shares of Nielsen. Mr. Steinfeld said: "Well, I bought them." I said "You did" and I said "Did you buy them for L. Zeckendorf & Co. and he said No. And I said, "Did you buy them for yourself" and he said "No, bought them for the Silver Bell Copper Company; at that time it was the Nielsen Company; first it was the Nielsen Mining and Smelting Company, and then they changed the name to the Silver Bell Copper Company. I said, Where is the stock? I want to see it. Well, it was sometime before they found it; finally Mr. Steinfeld opened his drawer in the desk and he pulled out the contract between Nielsen and himself and the company, and in this envelope were the 300 shares of Nielsen. By the 300 shares I mean certificate No. 2 here, for 300 shares. This certificate and the contract of the Nielsens were handed to me and I took them. Then I said to Mr. Steinfeld: "Did you pay any money?" and he said: Yes, he did. I advanced \$2,000 to Nielsen. And I believe the other name was Lewis. Anyhow there were two parties in connection with these shares. They had options for working mines out there, and Nielsen had options also on some mines out there. And some others had located some mines and this \$2,000 covered all their interest. Well, I said: "Now, inasmuch as you have advanced this \$2,000 L. Zeckendorf & Co. shall return these \$2,000 to you." He said: "Never mind, about that; they owe a great deal of money to the firm already; let the \$2,000 stand that way as \$2,000 due me. I made the remark: "That is very liberal on your part." I took these 300 shares and I said: "Albert, you admit that these 300 shares belong to the Silver Bell Mining Company—or the Nielsen Mining and Smelting Company it was then. And he said,

92 93 "Yes, they are the owners of it." And he said, I will tell you what we will do; we will cancel—

By Mr. IVES:

Q. You said that?

A. Yes, sir. To Mr. Steinfeld, I said we will cancel this and the company will have outstanding 700 shares, and that will be the actual capital stock of the company. Mr. Steinfeld said: No, don't do it that way. I will tell you the way. He said: I jointly with the mining company have assumed some responsibilities. I assumed jointly with the mining company to pay Nielson \$10,000 when the

mines are sold; and if the mines are not sold, the first earnings, after the debts are paid, Nielsen gets his division of \$10,000. I said: You write out that stuff and put it in my hands as trustee and I will hold it in trust for the Nielsen Mining Company. I then took this certificate No. 2 and pasted it in this book.

I myself wrote the word "cancelled" written across this certificate No. 2 at the time I issued the new certificate. Mr. Steinfeld was present.

Q. Did he see you do that?

A. I showed it to him.

91 That was done, I dated it here in January. When I say I showed it to him, I mean that I then and there showed it to him. That I showed it to him right away. I showed him the back of it. At the time I issued the certificate I cancelled this certificate of 300 shares and I myself pasted it in this book. I then went to work and issued this certificate No. 5, the number of shares, 300, dated January 12, 1901; to whom issued, Albert Steinfeld, trustee; by whom transferred, Carl S. Nielsen; cancelled by issue of No. 2; on that page I put it down. That was before the certificate was torn out of the book. At the same time I had a conversation with Mr. Steinfeld with regard to this certificate and told him I shall indorse the stub with the condition of this certificate. He said that was all right. I put down this certificate, No. 5, 300 shares as the property of the Nielsen Mining and Smelting Company, issued to Albert Steinfeld as trustee, to be held by him until the agreement between the Nielsens dated June 29, 1900, is carried out. This book was kept in the safe of L. Zeckendorf & Co. All the other books were not kept there but this book was particularly kept there. I don't know where the other books of the company were. I saw some of them at the time; they were in what they called the private office. I saw the minute book. I saw some of the books; but this book was kept in the safe. At the time I called Mr. Steinfeld's attention to this stub and this endorsement on the certificate, in connection with
95 this I wish to say that I showed this book to Mr. Franklin for legal advice, and I asked him if it was correct. I first showed the book to Mr. Steinfeld—I mean to Mr. Franklin when they first were issued. I then asked him in regard to the proper number of stamps that the certificate wanted. I asked him to tell me how many stamps were required, and whether the certificates were correct. He said they were. Subsequently, in was probably several years afterwards, when the Nielsen shares were issued, I took legal advice on the question; I showed the book to Mr. Franklin and I said: "Mr. Franklin, I want you to look at this certificate and see if it is legally correct." And he said: That is all right. Mr. Franklin read the stub too. At the time I issued this certificate you had to have stamps on them. I wrote that on the stub shortly after that, but the certificate at that time was still in the book.

By the COURT: Now, you offer in evidence the stock book.

Filed with the clerk and marked Plaintiff's Exhibit 59.

I remained in Tucson in 1901 probably until the month of May. During the month of May. Then I returned to New York.

96 By MR. MESERVE: Now, we ought to have a letter written by Mr. Zeckendorf to Mr. Steinfeld, February 27, 1903, March 30, 1903 and June 5, 1903.

MR. MESERVE (reads from a book):

TUCSON, ARIZONA, *June 5, 1903.*

DEAR ALBERT: (This letter consists of four pages, signed, affectionately, Your Uncle Louis.) The particular part is as follows:)

"Now, in regard to Mr. Johnson; I think you made a terrible mistake to give a stranger an option to purchase the Silver Bell for \$375,000. There is a vast difference to accept a bona fide offer and to give an option. You have cut the price just in half of our former price. What do you expect to get now when you bear down your own property. Mr. Johnson can now go into the field and offer the property at any price above the price you named as long as he sees a margin in it for himself; and if he does not succeed your property is made unsalable."

Then he says: "I wish you would send me my stock to which I am entitled in the Silver Bell Copper Company."

97 The letter also of February 27, 1903, addressed to Albert Steinfeld:

"Dear Albert." Consisting of two pages, signed "Your Uncle Louis."

I will read this part:

(Reads from book.)

"I have submitted reports of the Silver Bell, Azurite, the former at \$750,000, the latter at \$60,000, less ten per cent, and I will hear from them ere long. Copper was sold yesterday at 13.32."

We also introduce letter from Louis Zeckendorf to Albert Steinfeld, March 6, 1903, consisting of two pages.

(Reads from book.)

"I refer to my last of 27th ult. and today I received your answer to my des. of yesterday. Sometime since Mr. Lezinsky sent a report to the Farsis Copper Company, London, and named the price one hundred fifty thousand pounds. Yesterday he had a cable asking cash price for the property, and I told L. to cable that we would let them know within a week. Copper is still at 13.34."

98 We also introduce letter of March 12, 1903, from Mr. Zeckendorf to Albert Steinfeld, consisting of two pages, signed "Affectionately, Your Uncle, Louis." It refers to the letter of the 6th and says:

(Reads from book):

"Referring to yours of the 5th and 7th of August (then come Code words)

Q. Mr. Zeckendorf, can you interpret that code wire without your code?

A. No.

MR. MESERVE (continues to read from book):

"Lezinsky called and said he had two parties ready to examine the Old Boot at a moment's notice and will be cash down, and now

I will wait what Murphy party does. I would prefer these parties to the English who, as a rule are too slow."

Mr. MESERVE: We also introduce letter of March 30, 1903, to Albert Steinfeld from Louis Zeckendorf, consisting of two pages, addressed to Albert Steinfeld, Tucson, Arizona.

"Dear Albert," signed "Your Uncle, Louis."

(Reads from the book):

99 "Referring to my letter of the 12th inst., and have received both yours of the 11th and 14th inst. I erred in the name of the Copper Company. It is the Tharsis Company. These people mean business now, and offer to pay cash down, and I sent the cable to that effect. It would be poor policy to show the property to anyone while negotiations are pending. It looks like business, otherwise they would not go to the expense of examining the property again. I wish you to bear in mind our contract with the American Mining Company. The purchaser has to release us of something. I mention this again in order to remind you of the importance. In the meantime should the Gage party not take the boot, I will be able to do something in that direction here.

You didn't say anything about affairs in Nogales."

By Mr. MESERVE: Letter, March 30, 1903, addressed to Albert Steinfeld "Albert Steinfeld, Esq." Tucson, Arizona: "Dear Albert" consisting of two pages. Signed "Your Uncle, Louis." (Reads from the book):

"At any rate should the Gage people turn it down, and if we can make both ends meet we should start it up. There is a large lot of coke on hand which can be realized; besides we can get something for the property while in full blast, than otherwise.

100 "We have now, as I said before, these different parties willing to examine the property, but we will not permit them to do so now before you have a decision from the Gage people, and I think you will know ere long."

Mr. MESERVE: Letter April 9, 1903, addressed to Albert Steinfeld by Louis Zeckendorf, consisting of two pages. Addressed to Albert Steinfeld Esq., Tucson, Arizona. "Dear Albert" and signed "Affectionately Your Uncle, Louis." (Reads from book):

"Received both yours of the 2 and 4th inst. and also of 30th ult. I would have answered before but had to remain at home for ten days owing to severe cold.

Regarding the contract with the Gage people, it is all O K if they take the property; otherwise we have lost good opportunities. Copper is by no means as strong as it has been, and if they make the final payment the rest will follow."

Mr. MESERVE: Letter April 29th, 1903, from Louis Zeckendorf to Albert Steinfeld, consisting of two pages, addressed to Albert Steinfeld, Esq., Tucson, Arizona. "Dear Albert" signed: "Your Uncle, Louis." (Reads from the book):

101 "William had no papers regarding his interest in Silver Bell except you have given him which I doubt arrangements which were made at that time. He was entitled to three per cent interest in the enterprise which we held in trust for him. Should the Gage party

make the first payment, of course, you will apply the same for our claim, and the balance pro rata as their interest appears. I had inquiry from Paris and others regarding Bell, and if copper don't decline will be able to sell the property any way."

By Mr. MESERVE: Letter addressed to Albert Steinfeld, Tucson, Arizona, May 5, 1903; "Dear Albert"; consisting of two pages; signed "Affectionately, Your Uncle Louis." (Reads from the book):

"Received yours of the 25th ult. and refer to my last of the 29th. I also received account of last year's sales. William says he has nothing on hand regarding his interest in the Silver Bell, except that agreement to pay him 3 per cent of the net proceeds, and I suppose you understand it so as I do."

By Mr. MESERVE: Letter May 15, 1903, from Louis Zeckendorf to Albert Steinfeld, Esq., Addressed to Albert Steinfeld, Esq., Tucson, Arizona. "Dear Albert."

"Referring to my last of the 15th inst. and received yours of the 7th. I am anxiously awaiting your dispatch if the Gage people made their first payment; if not; I will send you another party to look at the property. I hope the Gage people will not ask you to make further concessions, and you better stand by your proposition."

Letter May 21st, 1903, from Louis Zeckendorf to Albert Steinfeld, Esq., Tucson, Arizona; "Dear Albert":

"Referring to my last of the 15th inst. and yesterday received your most welcome dispatch that the Old Boot is actually sold. I had great anxiety and fear that something might happen not to consummate the deal. I congratulate you upon your success, and I think that we ought to feel very happy at the result, and hope purchasers will make a fortune out of it."

We next offer in evidence the Journal of the Silver Bell Copper Company covering the period from February 1, to —.

We offer in evidence, under date March 21, 1901, the following entry: On page 32:

103 Mr. MESERVE: On page 59 of this book, of the Journal, under date of May 19, 1901, Albert Steinfeld, trustee, C. S. Neilsen, stock purchase, \$2,000 on account of stock, chase, \$2,000 on account of stock.

Mr. MESERVE: We next offer in evidence the page 246 of the Ledger C of the Silver Bell Copper Company, reading as follows:

The first one is Albert Steinfeld, Trustee, Mammoth Copper Company, in pencil, May 22, 1901.

March 21, J. 22.....	9,501.79
Pending adjustment	1,515.00

Now I show where that is carried in the ledger on page 246 of the ledger under March 21, \$9,501.79.

On the opposite side of the page, May 22.

Check 928-35	950.17
Balance	8,551.62

By the COURT: Was that check given to Mr. Steinfeld as trustee?

Mr. MESERVE: I think that will be admitted that that was the check given to Mr. Steinfeld, trustee, for interest on this account. Is that correct, Senator Ives?

104 Mr. IVES: That is correct.

Mr. MESERVE: We now direct the court's attention to the folio entry the Albert Steinfeld, trustee, C. S. Nielsen stock purchase, \$2,000 is carried into the ledger.

And we now offer in evidence that account as it appears in the ledger: (Reads from the book.)

Albert Steinfeld, Trustee, C. S. Nielsen, Stock Purchase, May 29,

Journal 59	\$2,000.00
On the opposite page, check 929, folio 35	200.00

I presume it will be admitted that that was a check in favor of Albert Steinfeld, trustee, for interest on this \$2,000.

Mr. IVES: Yes.

Mr. MESERVE: The balance added up makes \$2,000.

By the COURT: I don't understand the entry.

105 Mr. MESERVE: I don't understand it either. I am simply showing what it is; there is the entry.

The record shows that Mr. Steinfeld received \$915 interest.

Mr. IVES: Not a check; he never used it; the record don't show he received that money; the record shows a check for that amount intended to be for interest was sent to Mr. Steinfeld, not that he received the money; he returned the check.

Mr. MESERVE: You can make your statement of what you expect to prove afterwards; but you will admit now for the purposes of our case, that this represents a check numbered 928 of the Silver Bell Copper Company in favor of Albert Steinfeld, trustee, for \$950.17, and it went to Albert Steinfeld, and drawn on L. Zeckendorf, being a printed check as though L. Zeckendorf & Co., was a banking house for the Silver Bell Copper Mining Company.

Mr. HENEX: Yes.

106 MESERVE: And you will also admit that the check 929 was of the same character, drawn on L. Zeckendorf & Co. by Steinfeld for \$200 and it was for interest and was delivered to Albert Steinfeld.

Mr. HENEX: Yes.

Mr. MESERVE: We call the Court's attention on the entry of the Albert Steinfeld, trustee, account, page 246 of the ledger C.

Albert Steinfeld, Trustee, C. S. Nielsen, Stock Purchase,

Page 246 of ledger C, underneath the balance is marked

Ledger D 286	\$1,800.00
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Referring to Ledger D page 286;

That the same folio referred to, carrying a balance, \$8,551.62 under the Albert Steinfeld, trustee, account.

And we now offer in evidence Ledger D of the Silver Bell Copper Company which appears to have commenced June 1, 1901.

107 We offer in evidence the right hand column, the entry:

Albert Steinfeld, Trustee, Mammoth Copper Company, June 1.

Ledger C 246..... \$8,551.62

We offer in evidence the entry in the next account.

Albert Steinfeld, Trustee, Carl S. Neilsen.

Stock, June 1, Ledger C, 246, folio..... \$1,800.00

The whole book is offered in evidence.

We next call the Court's attention to the fact that on the opposite side of the page appears the following entry, apparently without date,

Account returned 9,501.79

To A. S.

Interest returned 950.17

Under the Albert Steinfeld, trustee, account, without date.

Account returned \$2,000.00

To A. S.

Without date, interest returned..... 200.00

By the COURT: The entire books are offered in evidence.

108 Ledger C marked plaintiff's Exhibit No. 115.

Mr. MESERVE: Referring again to page 146 of the Journal under date of September 1st, 1901 there appears this entry:

L. Zeckendorf & Co., cash..... 1,150.17

Interest returned

On page 26 of Ledger E, we find September 1, profit and

loss, journal 146 1,150.17

Under heading, L. Zeckendorf & Co., cash.....

SELIM FRANKLIN called on behalf of the plaintiff, testified as follows:

Direct examination by Mr. MESERVE:

I reside at Tucson, Arizona, and have resided there about 22 years. I am attorney-at-law. I have practiced that profession in Tucson, Arizona, about 22 years. In that time I have been in the active and extensive practice of the law. I know Albert Steinfeld, L. Zeckendorf, J. N. Curtis and R. K. Shelton. I know that certain corporation formerly known as the Nielsen Mining and Smelting Co., now known as the Silver Bell Copper Company. I have had relations with the Silver Bell Copper Company as attorney. From

109 its inception to sometime in May, 1903, I knew all about the action of its board of directors. In the minute book of the corporation are the minutes of the board of directors and of the stockholders. I prepared, within the times I have mentioned all those minutes except, I believe one or two meetings of the stockholders, where they elected their directors. Mr. R. K. Shelton was a member of the board of directors. I know who selected him for a position on that board. Mr. Steinfeld and Mr. Curtis and myself, I think.

Q. Do you know who suggested the name of Mr. Shelton?

A. I cannot be positive whether it was either Mr. Steinfeld or Mr. Curtis, or perhaps Mr. Donau who was there, or perhaps myself, who suggested the name of Mr. Shelton as a director. To my knowledge he signed the minutes of the board of directors and of the stockholders as secretary; signed shares of stock as secretary; he wrote, I believe some of the minutes which I prepared, one or two of the meetings. If I saw the book I could tell. I know whether or not he ever personally attended a meeting of the board. I think he attended at the first meeting.

I drew the articles of incorporation of the Neilsen Mining and Smelting Company at the time of its organization. I perfected the organization of it. From that time on I was the attorney for 110 the Neilsen Mining and Smelting Company and subsequently the Silver Bell Copper Company, up to a short time after this sale, which was some time in May, 1903, the latter part of May, 1903. At that time the Neilsen Mining and Smelting Company or the Silver Bell Copper Company did not have any other attorney, except on one occasion during the negotiations with Mr. Hill in regard to a contemplated option on the Old Boot mine, when I requested Mr. Steinfeld to get somebody else to draw up his proposition and he got Judge Barnes. During the time that I was the attorney for the Neilsen Mining and Smelting Company I was no retained attorney for Albert Steinfeld. I had been employed in matters by him, but I was not his regular retained attorney. Any matter that he wished me to attend to he would present to me.

You are asking if I performed any service for that corporation as the attorney for any one else. No, what I performed as attorney for that company I performed for that company and for no one else.

(Book shown witness:)

Q. Who drafted those minutes, if you know?

— I know I drafted these minutes (referring to minute 111 book); that is, I dictated them to my stenographer who wrote them in this book, with the exception of a line or so here, which is in my handwriting.

These minutes were drafted as the result of a consultation or meeting with Mr. Steinfeld, Mr. Curtis and Mr. Neilson; I have forgotten whether it was one or many consultations, but it was one or many consultations, but it was the result of that, and what they wished accomplished in regard to this organization.

My best recollection is: I can tell how this was done as near as I

can recollect it, of this particular one; there was first—there were conversations, a good many, I think, between Mr. Curtis and myself, some between Mr. Neilsen and myself; some between Mr. Steinfeld and myself; some when we were all together, the result of which was—

Q. By we, who do you mean?

A. Mr. Steinfeld, Mr. Curtis and myself, and possibly Mr. Neilsen, in which it was desired to accomplish a certain thing, a certain result in regard to which I made many suggestions; and after that was all done I drafted the minutes of this meeting, which included the by-laws:

MR. HENEY: You are referring to the first stockholders' meeting now, Mr. Franklin?

112 A. The first one; this is the first one I am quite sure.

When these minutes were drawn up that I have just referred to, the first minutes of the stockholders; during any of the meetings of the stockholders at which I received instructions I don't think Mr. Shelton was present until after they were prepared. After they were drafted, then we called a meeting in the back office of L. Zeckendorf & Co. Mr. Shelton was there as I recollect it, Mr. Neilsen and Mr. Curtis, and I don't remember whether Mr. Steinfeld was there or not. The two rooms are adjoining. I stated to them, I have prepared these minutes and they were adopted, passed. There was some discussion, I don't recollect now.

There wasn't any habit or custom. I don't know but what each particular minute was drawn up under a different set of circumstances from the other. I will just explain on one occasion; I wished to leave town, I wanted to get away for the summer, and I drafted up a resolution to be adopted and I gave them to Mr. Shelton, and asked him to write up the minutes and put them in. That was one occasion. I don't know whether they held a meeting or not. I drafted the particular resolution, the minutes, and gave them to him; they were typewritten. Therefore, I stated, as to each meeting the circumstances were different.

113 Up to the time that I quit as attorney for the company I drafted the minutes before they were adopted, except one or two in here or three perhaps, that Mr. Curtis, the election of directors by the stockholders. It was not the habit to hold meetings and there take notes of what occurred at the meetings. There was no custom, as I have stated; I have to be asked about each meeting, because it might be different. There was no meeting at which I recollect where they sat down and met and took notes of what occurred and discussed them at the meeting. There was one or two meetings here, one or two minutes in here in Curtis' handwriting; I don't know anything about it.

The first facts in relation to a conversation between Mr. Steinfeld and myself on the subject of Neilsen's discharge I think he said to me that he had discharged Neilsen; and that Neilsen would not be discharged, refused to be discharged, and I believe he showed me a letter he had written to Neilsen. Anyhow he said that Neilsen would not leave the property; and I said to Mr. Steinfeld that he

had no authority to discharge Neilsen; and I said to Mr. Steinfeld that it required a resolution of the board of directors of this corporation, and we would call a meeting. I wrote up first the minutes of February and we dated them back so as to ratify, as it were, his previous discharge; and then suggested the calling of the second
 114 meeting and gave notice to the directors, so that there would be a formal meeting, about which there would be no question. I had no conversation with Neilsen about that at all, myself.

As I have said, this purported to be of date February 1st, 1900. It was after that time, as I have stated that Mr. Steinfeld told me he had discharged Neilsen, and that Neilsen refused to be discharged; that he was out at the property and would not leave, and that Mr. Steinfeld showed me the letter that he had written to Neilsen discharging him. My recollection is, that it was after February 1st, 1900.

Now in order that it might appear as though the board of directors were behind the action of Mr. Steinfeld, I drew up the minutes of February 21st, and dated them, as a ratification of his action, showing that the corporation was behind him. The date of the letter which Mr. Steinfeld wrote to Neilsen, discharging him, if produced will show. As near as I can recollect I consulted no one but Mr. Steinfeld. I don't think Mr. Shelton had anything to do with that meeting, other than signing it.

Mr. HENEY: Do you mean to testify that of your own knowledge, That no such meeting ever took place?

115 A. No, I did not say that; I say I drafted these minutes and I then presented them and the book to these gentlemen; I don't know what they did with it.

Mr. IVES: You say you antedated it. What do you mean by that?

A. I mean the conversation took place—the conversation between Mr. Steinfeld and myself, took place after February 21st, that these minutes were written after the date. I mean that no meeting was held on February 21, at all because this subject did not come up until afterwards, either later on in February or in March, when I drew this up in order that there should be a resolution on the record of this corporation back of Steinfeld's—antedating Mr. Steinfeld's letter discharging Neilsen.

Mr. HENEY: You advised them to hold meetings as of that date?

A. I don't know as anything was said on the subject.

Mr. HENEY: You don't mean to say that you prepared a false recital and record?

116 Mr. MESERVE: I suggest that you cross-examine Mr. Franklin when you come to the point.

By the COURT: Yes.

This next meeting is of date, Saturday, March 10, 1900. Now, prior to this meeting I had suggested and given to the secretary a form of notice to serve on the board of directors, I think, so that this would be a formal and regular meeting. I drafted these minutes.

As I recollect, it was this way: These minutes purport to have been to the meeting on that day; that is to say, the meeting first met at

10 o'clock, and then adjourned until 4 o'clock in the afternoon. I think I was present. A meeting was held. I don't think these minutes at that time were written up until after the meeting; but at that time there was a regular formal meeting.

I wish to state that in the morning Mrs. Neilson was at that meeting, and I was not there, and it was adjourned until 4 o'clock. I was there and she was expected back, but she did not show up.

I wrote those minutes. A part of this was drafted by me.
117 There is an adoption of a resolution, which resolution was sent, I don't know whether it was sent to me by Mr. Goodrich or Mr. Robinson, or whether it was handed to me by Mr. Steinfeld or Mr. Curtis.

In the first place, at this time an option was out to Mr. Beaton, or his nominee, for the purchase of these mining properties; it was before the consummation of the sale and certain resolutions which are in here were drafted and were drawn by Ben Goodrich or by Mr. Robinson; he was one of the attorneys for the intending purchasers. These resolutions came into my possession, and whether they were sent to me by letter from Mr. Goodrich or whether they were handed to me by Mr. Curtis or Mr. Steinfeld, I do not remember, but they came to me in one of these ways; they were either sent to me by Mr. Goodrich or handed to me by Mr. Curtis or Mr. Steinfeld; that is my recollection of it. They desired the corporation to adopt this particular resolution; then I drafted and drew up the minutes of this meeting as set forth in here, and whether I turned this over to Mr. Curtis or to Mr. Steinfeld, I don't remember.

This matter has not been called to my attention until this moment, and I have no particular recollection about this particular matter at this time. I had a great many talks with Mr. Curtis in regard to this deal, and a great many with Mr. Steinfeld; now, with either one or the other of those gentlemen I discussed the matter of the

118 adoption of these resolutions sent by the representative of Mr. Beaton. I discussed the matter of the adoption with either one of these two, or perhaps with both of them. I wish to state that if you will permit me to look at my correspondence I could probably say.

Yes, I knew all about the price and terms before I drew these minutes. I got my information from Mr. Steinfeld at the time we drew the Beaton option. The price was whatever the price was given in the option. The conversation was this in substance: There was a resolution produced to me, however, I got it, which Mr. Goodrich and Mr. Robinson, representing the intending purchasers, desired this corporation to adopt, as well as another resolution of similar nature which they desired the Mammoth Copper Company to adopt. I had a conversation in regard to both of these resolutions, with both of them, I think possibly one of them, possibly both, in which I suggested the necessity of drafting minutes. I drafted the minutes then which are the adoption of that resolution. The resolution itself was prepared—the resolution that the intending purchasers wanted adopted.

Well, I will just state this, I assisted in the preparation of the

Beaton option and the question of the price of the mines was certainly considered. There was nothing said in regard to its distribution whatever. Nothing was said on that subject that I can
119 recollect at all until either the day before or the day the money was paid. In other words, when the deal was definitely concluded.

Q. What date was that, as near as you can recollect?

A. The deal was concluded on May 20, 1903. There was necessarily conversation between Steinfeld, Curtis and myself in regard to the distribution or division of the purchase price. I made suggestions in regard to the matter myself.

Q. After drawing these minutes and up to the time the deal was completed, state between these times all the conversation that occurred regarding the distribution of the money, between yourself, Steinfeld, Curtis, or both of them.

A. Well, I might omit some of the conversations.

Q. Just as much as you remember?

A. I brought up the matter myself; I don't remember now, I can't remember whether it was on the 20th, the day before the 20th, or the day after the 20th of May, because there were so many conversations between us that I can't remember that, but I know the subject came up as to the matter of the distribution of the purchase price. I suggested it myself—first, I wish to state that
120 Steinfeld, I think, expressed his willingness or said he would accept the \$18,000 coming to him under a certain option of purchase, dated July 15, 1901; that he wished to be secured in some way for his guaranteeing the titles and for his many obligations. I suggested that he ought to be secured, and the way to secure him, I think it was my suggestion, was that he should retain all of this purchase money, I didn't care in what capacity, he should retain it either as trustee, I think as trustee, and that he should be indemnified against loss by virtue of his guaranteeing the titles to these mining claims, that guarantee lasting one year, as to the most of the claims, and as to the others until the patent was issued. They should also secure against a threatened suit on the part of Burnett; and also for the payment of the amounts due to Volkert and Francis and the Neilsens, and all the other liabilities which he had assumed by virtue of his trying to sell the property on previous occasions, it not being then definitely known what other men might make a demand for commissions. Now, I suggested this myself. I think I was consulted and I suggested that was the proper way to do. I am going to give you the substance of what was said. It was my aim in this matter to do what I thought was the proper thing to be done, and whether it was proper or not, I thought it was proper I said
121 to these gentlemen that with certain suggestions and modifications and the suggestions were adopted.

After the consummation of the sale on May 20, 1903, my recollection is that on the next day I commenced to prepare and did prepare—I don't remember whether it was the next day or not, I think it was about two days after, to prepare an agreement between the Silver Bell Mining Company, the Mammoth Mining Company and

Albert Steinfeld which would fully cover what I considered were the propositions which had been agreed to and which ought to be covered. At the same time I had these minute books in my possession, three days, I think it was three days, and I commenced to draft and did draft what seemed to me were the minutes which would properly express what had been agreed to between Steinfeld, Curtis and myself. Now, I wish to state in regard to these minutes that when I had completed the agreement, at least when I had completed the draft of the agreement, I also completed up to a certain point the minutes, the point being——

Q. Give the page of the book?

Up to and including line 23, on page 46, right here (indicating); now when I took this draft of agreement down to Mr. Steinfeld and gave it to him, and he looked it over and said it was very
122 long; I think the next day I went down there and saw him in regard to it, and he said it was too voluminous; that he would prefer to have a draft of something more simple. (Counsel hands witness paper.)

This is a copy—a carbon copy of the form of agreement which I drafted:

Mr. HEREFORD: I offer this in evidence.

Admitted and marked Plaintiff's Exhibit 133.

I think at the time I handed this draft to Mr. Steinfeld I said to him: I have made this very full and complete because Mr. Zeckendorf don't know anything about these English properties and the transactions in regard to the English matter; he don't know anything about any of the matters mentioned in here, and in my opinion it is advisable to have this contract so that it will advise him fully of all transactions, and which would show all of the obligations for the payments of money, to the Neilsens, etc., and why the \$18,000 should be paid, and explains the whole matter. Mr. Steinfeld said this is too voluminous and a simple contract will do. Have one with a provision that this money can be distributed drafted, as well as one that will indemnify me, provided I have any loss.

Q. Now, with respect to May 20, about what date was it
123 that this contract here was presented to Mr. Steinfeld?

A. It took me about three days to draft the contract; it must have been the 23rd or 26th. The conversation that I had with him, I think it was the next day, he handed it back to me and told me it was too voluminous, and that a portion of the money could be distributed, provided the stockholders would indemnify him, in the event of his loss.

Now in regard to that I was referring partly to the English properties and not to the Neilsen stock, because I knew Mr. Zeckendorf knew about that; it was simply to the English properties and matters in regard thereto, including the proposition of July 15, 1901, and the contracts with Volkert and Francis, and in regard to the future payments of money. There were other things, of course, that I did know.

Mr. Steinfeld requested me to draft a simpler agreement. I did draw up a document of two pages.

Q. Plaintiff's Exhibit 28; examine that and see if that is the document you prepared.

A. That is a carbon copy of it; it is not the original.

124 Mr. HEREFORD: I want now to offer this in evidence.
Admitted in evidence and marked Plaintiff's Exhibit 124.

Q. Now, what did you do with that paper after you drew it up?

A. I don't remember now the details. I have forgotten whether I took it to Mr. Steinfeld or whether Mr. Steinfeld came to my office. It was submitted to him to see if it was satisfactory.

Q. About how long after May 20, was it submitted to him?

A. As I stated, it must have been at least four days; at least that; it might have been five days.

I have stated that I put it on the minutes at line 23 on page 46 of the minute book. When this was settled I struck out of the minutes a part of what I had written because it was not in conformity with the first—It was in conformity with the first draft of the agreement but not with the second. Anyhow it was not necessary to have it in there with the second, and the book shows what lines were stricken out. I did that and then I wrote the rest of the minutes. I don't know whether that day or the next day. I think all of the parties came to my office and signed the minutes.

125 They were written out and carefully considered by Mr. Curtis and Mr. Steinfeld; I remember I went over them and struck out certain parts so as to make it harmonize.

The minutes of the stockholders' meeting and the guarantee agreement you refer to were drawn up before May 20. There was nothing further. After these minutes were drafted I think all three of the directors came to my office. I think there was a meeting held; they were all there. I don't remember whether I read them all over or not; Curtis and Steinfeld knew about them; I don't remember whether I read them or stated to Shelton the contents; but a regular meeting was held and they were signed at that time. That was about the 24th, 25th or the 26th. It was three or four or five days after the 20th.

Cross-examination by Mr. IVES:

I drew most all of the papers for this company during its existence—the agreements, contracts and everything.

Q. Did you prepare all three of these papers (Referring to Exhibits 43, 44, and 45).

A. I did.

126 I think I prepared them all about the same time. I think I had them prepared in my office all at the same time. All three of these were requested at the same time to be made.

Mrs. Mary Nielsen.

Mrs. MARY NEILSEN, being first duly sworn, testified in behalf of the plaintiff as follows:

My full name is Mary Neilsen. I am the widow of Carl S. Neilsen. At the time I executed Exhibits 43 and 44 nobody paid me money for that particular thing.

There was a deed executed at about the same time in reference to a claim. Mr. L. B. Lewis re-located a claim in the Silver Bell adjoining the Old Boot.

Mr. Steinfeld made a proposition that we put that claim and the 300 shares in for the \$10,000. Mr. Neilsen and myself said that could not be done, as we were not the owner- of the claim; L. B. Lewis was the man who had the claim, and he had nothing whatsoever to do with the 300 shares of the Neilsen Mining and Smelting Company stock; he was not in anyway interested; he was simply a workman; he was the engineer out there. He re-located this mine and he gave Mr. Neilsen an interest in it, and Mr. Steinfeld made the proposition and wished to buy in this claim. We received \$2,000 for that claim, which had nothing to do with the 300 shares

of stock. This \$2,000 was paid in two checks, each for one
127 thousand dollars. They were deposited in the Consolidated National Bank, one to my credit and the other to L. B. Lewis' credit, during the latter part of the year 1903. I had conversation with Mr. Steinfeld in regard to the \$10,000 agreed to be paid by this agreement of the 29th day of June 1900. Mr. Steinfeld sent for me and said he was ready to settle up the \$10,000 and when he got down to business he said; that was in December, sometime in December 1903; I cannot give the exact date; he said that if I would discount it by allowing six hundred dollars, that I might have the money then. Then I said I didn't care to do that. Well, he said that Mr. Zeckendorf, his partner, and Mr. Curtis would object to him paying the full amount, as the money was not due until the following May; I then refused to settle; I said that I had seen Mr. Zeckendorf previous to that and he had been quite agreeable to settle. At the time he made these statements he did not make any statement with regard to who was interested, or had an interest in the stock, in the purchase of it. He said his partners, Zeckendorf and Curtis, would object to the payment of that amount. I had a conversation subsequently to that with Mr. Steinfeld; in January he sent for me, 1904, in January he sent for me and we had a settlement. I told him about seeing the other parties and they being agreeable to not

taking the discount. Previous to that he said he would allow
128 me \$150 off; I said I would not have any discount off. He

said, well, if the other partners were agreeable he would settle. This was in January, early in January. He said I must have a settlement, because very shortly he would not be able to make a settlement. That was in December. He said he thought his affairs would be tied up and he knew I was in need of money. L. Zeckendorf and J. N. Curtis were the partners referred to.

Q. Did you tell him in the January conversation that you had seen these two gentlemen?

A. I am not certain whether it was in January or December.

Q. What did you tell him?

A. I told him that I had seen Mr. Zeckendorf, and he was quite willing that I should have all of the money, that I should have interest on it instead of a discount.

Cross-examination by Mr. IVES:

I didn't look for the receipt of that \$10,000 to Mr. Steinfeld. I looked to L. Zeckendorf and Company. I supposed it was all one; I didn't know anything to the contrary. Mr. Steinfeld did all of the business; so that was all I know.

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Albert Steinfeld.

ALBERT STEINFELD called by plaintiff for the purpose of cross examination under the provisions of the statute, being first duly sworn, testified as follows:

Examination by Mr. MESERVE:

My name is Albert Steinfeld. I reside in Tucson, Arizona, and have lived here for about 33 years. My occupation during that time has been merchant. Up to the beginning of last year and up to the dissolution of the firm of L. Zeckendorf and Company, I was the junior partner with Mr. Zeckendorf in that business, Mr. Louis Zeckendorf and myself being the sole members of that firm. During that time and subsequent to the adoption of the articles which have been introduced as evidence here we were a co-partnership and operated under those articles, and whatever I may have done with reference to the business and property of L. Zeckendorf and Company of course, would have been done with the provisions of these articles always in mind.

I knew Carl Nielsen in his life time. I had known Nielsen a great number of years. He had been mining in the Silver Bell district. The first business which led up to the present connection was that I made a lease with him for the Old Boot mine, in my name as trustee for Julia Zeckendorf. It was a verbal lease; there was nothing in writing. The Julia Zeckendorf I refer to is the wife of William Zeckendorf, the brother of Louis Zeckendorf and is therefore the same person referred to by Louis Zeckendorf as his sister-in-law. Nielsen continued to operate under that lease. I can not tell how long a time before the Nielsen Mining and Smelting Company was incorporated. Possibly for six months; maybe not quite so long. During that time he became indebted to the firm. During that time I was the resident manager of the firm, and continued to be up to the time of the dissolution of the partnership.

I had direct and personal charge of the business in Arizona; I employed help and discharged help and fixed the salaries; increased or diminished the compensation of the employés. The business was

under my charge here. I also gave all credits which the firm would extend to other people; that was also under my charge; and all moneys advanced by the firm and all credits advanced by the firm during that time was under my control, and under my special observation. In other words, I was the busy man of that firm and attended to all of the business of the firm of every description in Arizona for all these years. In a general way, the amount to which Nielsen had become indebted at that time when the Nielsen Mining and

Smelting Company was organized was something like \$16,000.
131 The Niensens, as I have said, had become indebted to us and also to various other people and were in a way to block the properties and endanger the debt which we had against them. I consulted with our attorney, Mr. Franklin, and concluded after consultation that the practical way to protect ourselves was the organization of this company, the Nielsen Mining and Smelting Company. I then consulted Nielsen. At that time Mr. Curtis attended to and looked after matters that came up with reference to any mining interests L. Zeckendorf and Company had. He was not at the time on a regular salary for that purpose. He never was on a salary. He was not paid anything except in case of a sale or negotiations, and then he became interested. There was an agreement made with him by which he was to become interested in the properties which were sold; he was to have a certain percentage. That was prior to the arrangement under which he operated at this time. That arrangement existed at the time of the incorporation of the Nielsen Mining and Smelting Company. Mr. Franklin prepared the articles of incorporation of the Nielsen Mining and Smelting Company. I think it was the result of consultations we had between Mr. Curtis and myself, and I think Nielsen was there also; Nielsen was in bad shape financially speaking, and something had to be done to take care of him.

132 I don't know exactly who selected Mr. Shelton to act as a director of the company, but the probabilities are that I did. At that time he was in the employ of L. Zeckendorf and Company. I myself personally had employed him. During all the time that he worked for that firm I fixed his salary; he has been with us for quite a number of years and he continued down to the time the business went into the hands of a receiver and then with me again.

The original arrangement was that L. Zeckendorf and Company was to have one half of the stock and Nielsen one half; then we each gave Mr. Curtis one-quarter of our stock, making three-eighths, three-eighths and one-quarter. I think the stock was issued on that basis, but I am not positive; I think there was a memorandum certificate made out at the time, not on the printed book, just a typewritten memorandum. At the time I didn't have the printed certificates; afterwards that arrangement was changed. The Nielsen Mining and Smelting Company assumed the debts of the Niensens; that was a part of the consideration; they were afterwards paid. The debts were all paid up. At the time of the organization of the Nielsen Mining and Smelting Company they had substantially

nothing in the way of tangible assets, except a certain verbal lease on the Atlas and Red Rock properties, and this lease which I 133 had given them, all of which was subject to termination at any time. When William Zeckendorf, who represented his wife, Julia Zeckendorf, came out here to look over his property, it was under lease. I had received a royalty of \$1 a ton I believe for the ores. His visit here resulted in an option to purchase this property, an option from Mr. Zeckendorf. The legal title to the property always stood in my name. This option was on a basis of \$25,000 for the property.

I don't know as anything was ever said or done with reference to the one share of stock standing in Shelton's name, except that this share was put in his name so that he could qualify as a director. It was a part of the 500 shares which was the property of L. Zeckendorf and Company. That certificate remained in the stock book of the company until after the first day of June, 1903.

Mr. Nielsen was superintendent out there and Mr. Curtis was also connected with it more or less, giving it his personal supervision at times, and subsequently entirely so. During the time Nielsen was there, Mr. Curtis had general supervision and was president of the company. Nielsen remained there in charge I think until the end of 1900 or possibly in 1899; I am not sure of the dates it was either the end of 1899 or the beginning of 1900. I think it was 1899. During that time I was not a director of the corpora-

134 tion. I was not any other officer of the corporation prior to the time when Nielsen's connection with the company ceased. I remember the circumstances of the shutting down of the mine. I was in direct touch with the operations out there and knew what they were doing continually; some difficulties arose with Nielsen and they didn't seem to be able to get along at all with the handling of the business. After consultation with Mr. Curtis we concluded that we would dispense with Mr. Nielsen's services. I don't remember exactly, but I believe I wrote a letter discharging him. I told him to shut down the mine. At that time I directed that the mine be shut down if I remember right. I don't remember exactly what I did write.

Mr. MESERVE: I will offer this letter in evidence to be marked Plaintiff's Exhibit 125.

Letter admitted, read and marked Plaintiff's Exhibit 125.

After writing this letter I closed down the mine and wrote another letter discharging him as superintendent. At that time I had obtained knowledge of the fact that the ore bodies in the Old Boot mine were leading into the adjoining claims which I commonly referred to as the English properties; we thought they did.

135 Mr. Curtis, the president of the company, and I talked the matter over. We talked the matter over with reference to the effect on the values of these properties of all the development work or mining work in the Old Boot. The question of shutting down the mine with reference to the probable effect on the values of these adjoining properties if the Old Boot mine continued to operate

was discussed very frequently, and the advisability of securing these adjoining claims was realized, and many efforts were made to procure them. Mr. Curtis and I did not particularly determine to shut down the mine in order to prevent the prices of these adjoining mines advancing until after we could get hold of them. We closed down the mines there to see what our mines would possibly do in the development of these adjoining claims, and to secure them if we could.

We decided that it was necessary to get rid of the Nielsens. I had quite often reports from Mr. Curtis about the possibilities of the results of operating the mine, but as a matter of fact, the mine itself continued to go into debt, and the indebtedness gradually continued to increase. These were the reports Mr. Curtis gave me continuously and the indebtedness kept on increasing. At the time of the closing down of the mine the principal motives which I had for that action were to get rid of the Nielsens and acquire these adjoining
136 properties. Mr. Curtis had various plans; he thought that by enlarging the plant and increasing the operations of the property he could get better results than under the present operations. Mr. Curtis stated to me at that time, that the mine, if operated, would develop the value of those adjoining properties, or demonstrate the values and that it was advisable to close down the mine until these properties might be obtained, and the Nielsens dispensed with.

I negotiated for quite a while to procure the titles to these properties with various parties. Parties who were in charge of these properties, known as Francis and Volkert, representing the English owners, also with Mr. Hereford and directly with the owners, and also with Mr. Hill, who claimed at one time to have an option on the property.

Operations were resumed there if I remember right, in the latter part of 1900. In the meantime I had completed the negotiations for the purchase of these so-called English properties with the Francis and Volkert people but not with the English people. I completed the transaction with the English people in November. Operations at the mine were resumed in July or August. I think it was before I went away; I am not positive about that. Perhaps after I read some correspondence I might tell. Then I completed the negotiations
for the English properties. I went partly for that purpose.
137 That was the principal purpose, my prime purpose in going.

My son accompanied me on that trip. I returned in December, 1900. When I returned the mine was in operation and until December, 1901, or in the first part of January, 1902. It was closed down between that time and my purchase from the Nielsens before I went to Europe. There was no resumption of operations between the time I closed down and the purchase from the Nielsens, and the mine was not put in operation until after I acquired from the Francis and Volkert people their claims and from the Nielsens and Lewis their claims. I believe the Francis and Volkert properties were acquired in May and the Nielsens in June, 1900. Shortly after that the mine was opened and operations resumed. I don't remember exactly what month it was in; I think it was in July or August; perhaps in August. The amount of money that I paid the Nielsens

in cash at the time was \$2,000. I do not know how that \$2,000 was apportioned as between the Nielsens and Lewis. I don't remember anything about it; I knew that they were interested together. Perhaps something was said about Lewis getting part of it. At the same time and as a part of the same transaction, the 300 shares of Nielsen stock were purchased. And, as the consideration to the Nielsens for the transfer of that stock and as a consideration to Lewis and the Nielsens for the execution of the deed and as a part of the same transaction the contract was entered into between
 138 myself and the Nielsen Mining and Smelting Company as the parties of the first part, and the Nielsens as the parties of the second part. And it was that execution of that contract and the obligations of myself and the Nielsen Mining and Smelting Company therein contained and the payment of the \$2,000 that was the consideration which moved Lewis and the Nielsens to execute the transfer of the 300 shares of stock on that day. It was one entire transaction and all of it at the same time.

MR. MESERVE:

Q. I call your attention now to the meeting—the annual meeting of the stockholders of the Nielsen Mining and Smelting Company, held at the store of L. Zeckendorf & Co., on Monday, the 14th day of January, 1901, and ask you if you ever saw these minutes before? (Hands witness book.)

A. Yes, sir, I remember the minutes.

I remember that circumstance. I remember those meetings. I remember the fact of this meeting. I was present there. So far as I remember this is a correct record of what occurred at this meeting.

MR. MESERVE: We offer in evidence the minutes appearing
 139 in this minute book on pages 24 and 25; it is the annual meeting of the stockholders of the Nielsen Mining and Smelting Company.

Admitted in evidence and marked Plaintiff's Exhibit 125.

From that time I acted as a director of the corporation so far as I remember.

MR. MESERVE: I call your attention now to the item of May 18, 1900; Julius Volkert, \$1,875; will you explain what that amount was for.

A. That was the amount paid to Julius Volkert.

As a part payment of his interest in the Francis Volkert claims, and the consideration of the deeds which are introduced here in evidence from myself to the Mammoth Copper Company.

I call your attention to the item of \$3,665 63, seeming to be an addition; that was paid to the Globe Minerals Exploration Company—paid to the English people. That was the amount of money that was paid to the English people for their titles to these properties. That entry, Star Publishing Co. \$15, was for notice in connection with the Francis estate. "Mrs. Francis \$673.15"; that was a part of the purchase price named in these deeds that went to the Francis

heirs; the item of recording \$15 and C. W. Wright \$100, total \$115, was paid in connection with the Francis estate also, "Recording, January 15, \$1"; that was for recording these several deeds. Turning to page 59; entry on page 59, May 19, 1901, Nielsen Stock purchase, on account stock \$2,000, that item represented this money which was paid to Nielsen. At that time these transactions had all been closed; the money had all been paid; the moneys paid by me and the deeds received and recorded.

Prior to discharging Mr. Nielsen and shutting down the mine, I stated that I had consulted with Mr. J. N. Curtis. I had several interviews with Mr. Nielsen, just general interviews as to what they were doing, and his operations out there.

Q. What was said in any of those interviews with reference to your discharging him, or intending to discharge him?

A. I spoke to him about him going on these periodical spees which was the cause of Curtis' dissatisfaction of having him in charge there, and told him we could not allow him; that we would not be satisfied to have a thing of that kind; and Mr. Curtis requested me to give him a talking to, and it finally led up to him being discharged.

First I intended to do it, but Mr. Franklin told me I had no authority, and I caused it to be done by the board of directors.

141 There had been more or less negotiations for the purchase of the Volkert and Francis properties for quite a while previous to the discharge of Nielsen.

Q. How long after the time of the discharge of Mr. Nielsen, and the shutting down of the mine by you before you entered into negotiations for the purchase of the Nielsen interests?

A. It was the latter part of June.

Q. Then you began negotiations?

A. That I bought it; there were no negotiations. I happened to be out at the mine there and they were operating, working some mines adjacent, and the matter came up; and they wanted to sell their stock; and the conversation led up to finally my buying it.

The negotiations did not extend through any length of time, a day or so, and the terms of that purchase are as set out in this contract of June 29, 1900. Those were the terms agreed upon.

I think Mr. Lewis was present when I met them out there at their camp; we passed by there. I insisted that the Lewis locations of these outside properties, including the Clarence mine should be included, and it was upon my request that it was included. During

142 the time that intervened after I purchased the English properties, the Volkert properties and the Nielsen stock I don't remember having given any option to anyone except Parnall and what we termed the Davis people; that is an informal option. It was on the entire property as a whole, both of those options for one purchase price. The option which I gave to the Davis people, which I refer to as an option, was oral, and on the strength of which they came down and made an examination. It is the option I refer to in these letters to Zeckendorf. That option was on all the properties as a whole; all the properties that are described on this map here

as a whole and for one entire purchase price. Then when I came to negotiate with Beaton I also gave him an option on the entire property. That is the option which has been admitted here in evidence, a copy of which I sent to Mr. Zeckendorf in the letter. At that time I gave an option on the entire property for one entire purchase price. In these different negotiations I had it was treated as one entire property group. I was trying to find purchasers for it and offered it as one group. When I gave the option to Beaton which resulted in a sale I did not attempt to segregate the purchase price of \$515,000 into parts.

I did attempt to have negotiations and I did have negotiations with the board of directors of the Silver Bell Copper Company prior to May 20th, 1903, with reference to a division of the purchase price to be obtained for these mines. Prior to May 20th with reference to a disposition of the proceeds, not with reference to a division or segregation into parts of the purchase price there were no negotiations of any kind or character between me and any member of the Silver Bell Copper Company, in which there was any discussion as to the relative share that any one part of that property should receive as against the other.

Then during the entire history of that property, after the obtaining of the Francis and Volkert titles and the Nielsen and Lewis titles, up to the first day of January, 1904, there was no discussion of a division of that purchase price.

Q. Was there any such discussion with reference to cutting the purchase price into parts prior to January 1st, 1904. You remember the meeting was held January 10th, 1904?

(Question read.)

A. I am just trying to remember the dates. Your question is January 10th.

Q. I am talking about now the cutting of this into slices, parts; bearing in mind the meeting at which it was attempted to be done was January 10, 1904.

A. Yes, I think it was discussed at that time.

144 Q. Prior to January first?

A. Somewhere about that time.

Q. Do you know whether it was before or afterwards?

A. Well, it must have been about that time; I cannot state exactly.

Q. How many days before the holding of the meeting of January, 10th, was the first suggestion as to cutting that purchase price, or the division of that purchase price made?

A. There was no general discussion of it until that meeting but it was discussed amongst us.

Q. When was the first discussion prior to this January 10th?

A. Well, a few days prior.

Q. Do you think as much as ten.

A. Well, I hardly think so, but still it could be that many days.

Q. How many days after the stockholders' meeting of December 26th was it, do you think; do you think it was nearer the 10th of January or the 26th of December, that the first discussion occurred as to the cutting of this purchase price into parts?

145 A. Some short time after, perhaps about a week, perhaps so; it was a few days later that we discussed the matter, probably a week or so.

During the fall and summer of 1903, whatever possession I had of the moneys received on this purchase price and of the notes I had as treasurer of the Silver Bell Copper Company, and also as individual under the terms of that contract. Individually and for the purpose of securing me against various obligations which I had assumed and guarantees which I had made personally.

I had two of those notes in the fall of 1903 of the purchase price of those mines, each for a hundred thousand dollars. Yes, I sent them for collection to California, but they were paid by the Phoenix National Bank. They were sent to the Phoenix National Bank where they were payable and were there paid.

I received from Mr. Curtis, the treasurer of the Silver Bell Copper Company in January, 1904, the sum of \$145,743.75 in cash. That is by check. I cashed the check. I also received from Curtis, treasurer of the Silver Bell Copper Company at the same time a check for \$33,300 as a dividend at the rate of \$111 per share on the 300 shares of stock standing in my name as Albert Steinfeld, trustee, purchased from Nielsens.

146 I cashed that check. I also received at the same time from J. N. Curtis, treasurer of the Silver Bell Copper Company, and as a part of the same transaction, one of the four promissory notes executed by the Imperial Copper Company, to the order of the Silver Bell Copper Company as a part of the purchase price of the properties sold to the Imperial Copper Company.

I collected for myself individually and personally that note for \$103,967 and I have used it personally, in my own individual business and all prior to the 27th day of January, 1904, at the time of the filing of this complaint and since that time I have never held any of that money for the benefit of the Silver Bell Copper Company or claimed to; that \$145,743.75 in cash and that promissory note are mentioned in the minutes of the board of directors of the Silver Bell Copper Company held on the 16th day of January, 1904. I think it was about a week before that meeting that the first discussion took place as to a division of this purchase price.

I remember the circumstances of receiving the \$115,000 check in favor of the Silver Bell Copper Company on the 20th day of May; I remember the hour of the day at which that check was delivered to me. I think it was in the afternoon sometime. My impression is,

I may have mailed it to the Phoenix National Bank; it was drawn on that bank. I think they telegraphed me the next day that the check was paid. I did not in mailing them that check direct them to deposit it to my individual account. I think I opened the account first as trustee, but I am not positive about that, but I believe it was opened in my name. That afternoon after receiving the check I instructed the bank when I remitted them the check to remit it to L. Zeckendorf & Co.—make a telegraphic transfer of \$75,000 to New York, and I paid Governor Murphy I think \$22,500. He was here I gave him a check the same day, May 20th.

I don't know whether I drew a check in my own favor for \$18,117 that day or not. My impression is that I did. I think I deposited it right in the same bank in another account but I am not positive about that. That is my best recollection now. I did not do anything else that afternoon with reference to the Silver Bell Copper Company that I know of.

I don't know whether or not a meeting of the board of directors was held on the 20th day of May, 1903—just what that book says. We had a meeting a week prior to that; we had meetings every day. I think we had a meeting on that day. I know we did, in fact. In the morning I think. We had a meeting every day. We met and went over the conditions of everything that was enumerated
148 in those minutes and agreed upon,—and then they were reduced to writing. I think they were reduced to writing on the 20th day of May; it seems to me it was on that day. I think the transaction was closed with the Imperial Copper Company at something like two o'clock or right after that time. It seems to me the meeting of the board of directors of the Silver Bell Copper Company was held before I received that check. L. Zeckendorf & Co., advanced money to the Silver Bell Copper Company in the fall of 1902, and the spring of 1903. There were some disbursements made to their account; cash was advanced to the Silver Bell Copper Company in the fall of 1902 in the months of October, November and December; the aggregate amount of cash advanced during those three months October, November and December was just roughly speaking I should say five or six hundred dollars in money. In January, 1903, about \$250 more. The total merchandise and money is about \$2,500 during those three months, including that is October, November and December and January. Well that takes it into March.

From October to March, money and merchandise something less than \$2,500; in January \$515.79— from January 1st to March 27th I personally did not send any money to the Silver Bell Copper Company or to any person to be used on any of those mining properties
149 in 1902. I did not personally charge any of those properties with any of this money and did not have any of it transferred against my account. Not that I know of; the Silver Bell had an option to buy this from me, and they obligated themselves to do the work and pay the expenses.

I did not have any part of the account of L. Zeckendorf & Co., against the Silver Bell Copper Company for advances made in the fall of 1902 and 1903, charged against me individually, and that account and the entire account was paid by the Silver Bell Copper Company in this amount of \$115,000; and this was paid by that money, every cent of it. I don't remember whether I was out to those mining properties in October or November or December, 1902. I think a man by the name of Narbeth was in charge of the properties then. There was nothing to take charge of except the personal property, the machinery—nothing was on the mines. Mr. Curtis was still president and upon him devolved the responsibility of having the assessment work done.

Mr. Heney admits that the Silver Bell Copper Company did all the assessment work on all of these claims, all the time through the year 1900; from the time they were purchased by Mr. Steinfeld that the Silver Bell Copper Company did all the work and paid all the expenses whether it was development work or whether it was running a road or what it might have been. Everything
 150 that was done out there—that fact we admit, and that was true of 1900, 1901 and 1902 down to the date of the sale. Everything that was done out there.

The WITNESS: There was nothing done in 1903.

Mr. STEINFELD: If they done it they done it without our authority.

Mr. HENEY: We admit they did it if it was done; we don't care *care* whether it was done with out authority or not; if it was done they did it.

J. N. Curtis.

J. N. CURTIS called as a witness by the plaintiff testified as follows:

Mr. MESERVE: Mr. Curtis is called by the plaintiff in this action under the statutes of Arizona, for the purpose of cross-examination, he being a party defendant.

151 Mr. MESERVE: I asked the counsel to admit that the statements made by Mr. Curtis that he had received certain moneys and certain notes was true.

Mr. HENEY: Yes, we admit that.

Mr. MESERVE: I assume them to admit that Mr. Curtis received the proceeds of one of those notes as treasurer of the Silver Bell Copper Company, deposited in the bank to the account of the Silver Bell Copper Company, with this other money, as treasurer of the Silver Bell Copper Company.

Mr. HENEY: We admit that.

Mr. MESERVE: And that he made the deposit as treasurer of the Silver Bell Copper Company.

Mr. HENEY: The same day.

Mr. MESERVE: The pass book will show.

152 We will read right into the record the checks with their indorsements, and then they can take them back, I suppose they are proper receipts that Mr. Curtis ought to keep.

(Witness produces pass books and checks.)

Mr. MESERVE: (Reads.) The pass book of the Consolidated National Bank, Tucson, Arizona, in account with Silver Bell Copper Company, shows.

January 20, 1904, Deposited..... \$103,967.00

On the other side shows six vouchers returned as follows:

	27,639.00
	175.37
	25,303.65
	3,330.00
	18,870.00
	111.00
Balance	28,537.98
Balance	103,967.00

On the next page, February 1, 1904

Balance	28,537.98
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That constitutes all the entries in that book.

- 153 The Arizona National Bank, Tucson, Arizona, in Account with the Silver Bell Copper Company, J. N. Curtis, Treasurer.

January 4, 1904, deposit.....	49,987.50
January 16, 1904.....	103,867.00
Credit column:	153,854.50

145,743.75
114.40
7,996.38
153,854.50

Three vouchers returned February 12, 1904.

Mr. MESERVE: I suppose these checks—(producing checks)——

Mr. IVES: We will admit all about that.

Mr. MESERVE: That they are regularly drawn and the signatures on the back are the signatures of the party; they purport to be signed by the parties.

154 Mr. IVES: Yes.

Mr. MESERVE: (Reads):

TUCSON, ARIZONA, *January 16, 1904.* No. 1.

The Arizona National Bank of Tucson, Arizona.

Pay to Albert Steinfeld or order, \$145,743.75 One hundred and forty-five thousand, seven hundred and forty-three and 75-100 dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

Indorsed: Albert Steinfeld.

TUCSON, ARIZONA, *January 16, 1904.* No. 2.

The Arizona National Bank of Tucson, Arizona.

Pay to E. S. Ives, or order 114.40 One Hundred and fourteen and 40-100 dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

On the back: Pay to Smith & Ives or order E. S. Ives; Smith & Ives.

TUCSON, ARIZONA, *January 20, 1905.* No. 3.

The Arizona National Bank of Tucson, Arizona.

Pay to Albert Steinfeld, trustee, or order \$7,996.35 Seven thousand, nine hundred and ninety-six and 35-100 dollars.

155

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

On the back, indorsed: Albert Steinfeld, trustee.

Q. Now, Mr. Curtis, these were the only checks drawn on that account?

A. Those were the only ones, sir.

Q. Now, hand me the checks drawn on the other account.

A. This is the way they were returned to me by the bank. (Witness produces checks.)

Mr. MESERVE: (Reads checks:)

TUCSON, ARIZONA, *January 20, 1904.* No. 2.

Consolidated National Bank of Tucson, Arizona.

Pay to Albert Steinfeld, or order \$27,639.00 Twenty-seven thousand, six hundred and thirty-nine and No-100 dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

Indorsed on the back: Albert Steinfeld.

156 Mr. IVES: Permit me to state—this check No. 2 that check No. 1 drawn by Mr. Curtis, was for the same amount, same date.

Mr. CURTIS: No, sir; the first check was for \$27,750.00.

Mr. MESERVE: The first check the stub shows is L. Zeckendorf \$27,750 and that check counsel admits is still in the possession of Mr. Ives.

Mr. IVES: It was sent to Mr. Zeckendorf and he refused to accept it and I still have it in my possession.

TUCSON, ARIZONA, *January 20, 1904.* No. 3.

Consolidated National Bank of Tucson, Arizona.

Pay to R. K. Shelton, or order \$111.00 One hundred and eleven and No-100 dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

Indorsed: R. K. Shelton.

All these checks bear the stamp marked on the back.

157 TUCSON, ARIZONA, *January 20, 1904.* No. 4.

Consolidated National Bank of Tucson, Arizona.

Pay to Albert Steinfeld, trustee, or order \$25,303.66 Twenty-five thousand, three hundred and three and 65-100 dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

Indorsed: Albert Steinfeld, trustee.

Mr. MESERVE: We ought to call the Court's attention that the two checks, the one on the Arizona National Bank and the other one on the Consolidated National Bank of Tucson, in favor of Albert Steinfeld, trustee, just makes \$33,300 being \$111 per share on the 300 shares.

Mr. MESERVE: (Reads:)

TUCSON, ARIZONA, *January 20, 1904.* No. 5.

Consolidated National Bank of Tucson, Arizona.

Pay to Albert Steinfeld, trustee, or order \$3,330.00 Three thousand, three hundred and thirty dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

Indorsed: Albert Steinfeld, trustee.

158 This is admitted to be thirty shares that he held as trustee for William Zeckendorf, the dividend.

TUCSON, ARIZONA, *January 20, 1904.* No. 6.

Consolidated National Bank of Tucson, Arizona.

Pay to J. N. Curtis, or order \$18,870.00 Eighteen thousand, eight hundred and seventy dollars.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *Treasurer.*

Indorsed on the back: J. N. Curtis.

TUCSON, ARIZONA, *January 21, 1904.* No. 7.

Consolidated National Bank of Tucson, Arizona.

Pay to L. Zeckendorf & Co., or order \$175.37 One hundred and seventy-five and 37-100 dollars.

SILVER BELL COPPER COMPANY,

By J. N. CURTIS, *Treasurer.*

On the back: Pay to the order of the Consolidated National Bank of Tucson, Arizona, L. Zeckendorf & Co.

Q. What do you mean by the Silver Bell purchase?

A. What has been called as the English group in this suit.

Q. That is, they were known as the Silver Bell group?

159 A. Yes, before that purchase; that was the name of the old company, the Silver Bell Mining Company.

We drew every dollar for the expenses of the Silver Bell Copper Company on L. Zeckendorf & Co. Our checks were all drawn on L. Zeckendorf & Co. So that whatever money was expended on the entire mines and properties during any of the years when I was in charge, described in that map, that work was paid for by checks drawn on L. Zeckendorf & Co., by Silver Bell Copper Company's checks in these books. I kept practically two accounts, a mine account, the Mammoth mine account, and in the smelter account I credit and charge everything that pertains properly to the smelter and all the other charges and credits I charge to the mine account, and that would include all the mining and road building and everything that pertains to the development of the properties and transportation of the ores to the smelter, the smelter account being charged from that moment on. While I was out there I received \$150 a month to pay my expenses; that was paid by the Silver Bell Copper Company, the corporation. That salary continued up to the time the furnace shut down February, 1902. I had no salary from that time on. They had a watchman there, a man to look after the machinery and a little store which they kept to furnish those prospectors that was working outside on other properties, people that were
160 mining around there. I continued to be president of the corporation up to the time of the sale. I am president and treasurer of the corporation now.

Q. Mr. Curtis, I will ask you what attorney, as president of the corporation you consulted during the month of January, 1904?

A. Well, the only attorney that I ever had anything to do with was Mr. Franklin.

Q. During January, 1904?

A. January, 1904. Oh, Mr. Ives.

Mr. MESERVE: That is all.

Cross-examination by Mr. Ives:

Q. Was there any work done on the mines that we have designated in the year 1903 other than the assessment work for the year 1902?

A. No, nothing at all.

R. K. SHELTON, being first duly sworn, testified as follows, being called as a witness by the plaintiff.

By MR. MESERVE:

161 I am the R. K. Shelton named throughout the proceedings of the Silver Bell Copper Company. Yes, I am working for Albert Steinfeld & Company, a corporation. I remember having my deposition taken before Mr. Hartman in Mr. Hereford's office January 29, 1904, in this case.

Q. I call your attention, Mr. Shelton, to certain typewritten matter appearing on pages 82, 83, 84, 85, 86, 87, 88, and 89, and these loose pages between 90 and 91, in the minute book of the Silver Bell Copper Company, and directing your attention to the fact that there appears R. K. Shelton, secretary, on there; and I will ask you whether or not all that typewritten matter passed on these pages was not in your hands as secretary prior to the holding of the meeting on the 16th day of January, 1904.

A. Presumably it had been written up previous to the holding of the meeting; I don't remember as to that.

Q. I want to call Mr. Shelton's attention to the fact that it purports to cover more than one meeting; and I now ask him whether or not all that typewritten matter was not in his hands before the calling of the meeting of January 16, 1904, to order?

Q. Please answer my question, Mr. Shelton, if you can?

162 A. Well, I declare, that is a pretty hard one for me to answer in detail. Now, we discussed—I will say that we discussed the meetings previous to their having been held, if that is any satisfaction to you—but as to whether—I cannot answer you at this late day. It would refresh my mind to read the transcript of my deposition given in January, 1904, within a few days of that occurrence.

MR. HENEX: Read that over and refresh your mind.

(The witness' deposition is handed to him.)

MR. MESERVE:

A. Now, can you answer that question, Mr. Shelton?

A. Now, I understand these meetings took place—there is some considerable days' difference between the two different meetings. I could not say definitely, positively, as to whether these resolutions, if that is what they were, were written up, each set of resolutions, before each meeting, but they certainly were—all of the resolutions were not written up before all of the meetings, the bunch of them. What I mean they were not all written up at one time.

Q. Was all that typewritten matter there pertaining to any
163 one meeting prepared and handed to you before any one meeting? I mean all of the typewritten matter pasted in that book under date of January 16; was all of that in your hands before the meeting was held?

A. No, sir.

I could not say as to whether the typewritten matter under date of January 16, 1904, was in my hands before the meeting was held,

but the gist of this matter, the resolution itself had been. I don't know as to whether it had or not been written, typewritten, but it had been discussed and the resolution itself, the action that was to be taken, had been discussed. I do not know as a matter of fact that the entire minutes had been typewritten; I cannot at this late day tell whether it was before the meeting; I cannot remember whether they had been typewritten or not. I have no recollection about that matter now. I do know positively, most assuredly that the minutes of this second meeting were not in my hands at the time of the first meeting, because that never occurred at any time; and that was the reason—I didn't realize there was a series of meetings held on different dates there—included in his question. My sole reason for not knowing as to whether these minutes were prepared and shown to me in advance of January 16, 1904, is that it is over a year ago;

but I do know that we discussed the matters that are down 164 in the resolutions of the meeting of January 16th, before the meeting was held; and I know that we discussed the matters that are down in the minutes of the next meeting before the meeting was held; as to each detail of the meeting, there may have been a meeting when they were discussed when they came up. This one of January 20th, the long resolution, that is the big meeting. I mean that that had been discussed a short time before.

I did at some time own a share of stock in the Silver Bell Copper Company. There was a share of stock made out in my name at the organization of the company. Mr. Curtis came out and told me I had been made a director of the Copper Company, the Nielsen Mining & Smelting Company, and told me there was a share of stock in my name; as to the exact words—I chiefly remember I had been made a director and stockholder. I don't remember whether it was the first winter or the second winter, the first winter that Mr. Zeckendorf came out after the organization of the company, I did see the share of stock. That was when I first saw it as far as I know. He simply brought it out to me and had me sign my name on the back of it. Mr. Louis Zeckendorf did this. It was in the stock book yet, still attached to the stub. He simply handed me the stock book and turned it over and asked me to sign it, and I did. That was all I 165 remember that was said; in fact, I am quite positive there wasn't anything else said. That was the first winter, the first trip of Mr. Zeckendorf to Arizona after the organization or formation of the company. Several winters Mr. Zeckendorf didn't come out to Tucson. If he came the following winter that is the time. I don't believe Mr. Steinfeld ever said anything to me in any case in regard to my connection with the company. All my talks, if I remember rightly, were with Mr. Curtis. The next time that I had my attention drawn to the share of stock in that company in my name, was when Mr. Steinfeld gave me the share. I don't remember the date; it was when—after his affairs with Mr. Zeckendorf started, his trouble.

I remember the stockholders' meeting at which the discussion took place in regard to the rescission of a certain alleged contract between Albert Steinfeld and the Silver Bell Copper Company. This share

of stock was given me before that meeting. I could not tell how long before except—unless you can fix the time about the time of his return from San Francisco. He had made a trip to San Francisco sometime before this meeting and returned; very shortly after his return a very few days, at that time Mr. Steinfeld gave me that share of stock. He handed it to me. He said, "This is yours absolutely" or something of that kind; take it and keep it; this is yours.

166 I don't remember the exact words; he gave me to understand the stock was mine.

This took place at the store; nobody else was there as I know of. There may have been others there in the store. It was during business hours. I took the certificate of the share of stock and put it with other papers that I have. I collected my dividend on it; that particular certificate is the same certificate that I have referred to as having been indorsed by me in the bank.

Q. I call your attention to the fact that on May 29th, 1899 or May 8, 1899, there seems to be written out here in Mr. Zeckendorf's handwriting, a number of certificates, bearing your name as secretary. I ask you whether or not you didn't sign all of these certificates Nos. 1, 2, 3, 4, 5, and 6, on that same day that you indorsed that one certificate in blank?

A. I am certain that I did not, although—No, I am certain that I did not.

Q. Do you remember who asked you to sign these certificates of stock that are in Mr. Zeckendorf's handwriting? Do you remember of signing these certificates?

A. No.

Q. Do you remember signing certificate No. 1 as secretary.

167 A. I know I signed, I don't remember the time.

Q. You don't remember the circumstances?

A. No, sir.

Q. Do you remember whether it was the first time Mr. Zeckendorf came out here after the organization of the company?

A. No, sir.

Q. Do you remember whether it was in May, 1899?

A. No, sir.

Q. And you don't know it was the same time that he asked you to sign the one certificate, your certificate?

A. Yes, I am absolutely certain about that.

Q. What is there about your signing that certificate on the back different from the other?

A. That was my stock, the one I signed in blank.

Q. Do you remember signing this in blank as secretary, making it out, No. 5?

A. I didn't make any of them out.

Q. Do you remember signing that?

168 A. No, I don't remember the time; I know I signed it; I don't remember any of the circumstances in connection with signing the stock. I do remember the circumstances of signing; I could not tell you as regards the date. It is a very natural thing that I should remember that I was signing over something that was in my own name.

Q. Didn't you know when you signed certificate No. 5 that you were signing something that belonged to you?

A. No, nothing that belonged to me.

Q. You did sign that as Secretary?

A. Yes, I signed them all as secretary.

Q. You don't remember anything about that at all?

A. No, nothing in connection.

Q. Who have you talked to lately about this indorsement on the back of that certificate?

A. I haven't talked with anybody; I guess possibly I did talk with Mr. Heney about it too; I think I voluntarily told him why I was so positive as regards the share of stock.

169 Q. You don't remember at all who brought you the stock book and asked you to sign all those certificates as secretary?

A. No, I would not say it was Mr. Zeckendorf or that it was not at the time.

Q. How long after that did you sign this in blank on the back, that endorsement on the back?

A. I don't know; this has been a good many years ago; and the conditions were different; that was my stock.

Q. You don't know that at that time you signed all of these shares of stock, at that very same time you signed that other share of stock on the back?

A. No.

Q. Now, Mr. Shelton you didn't pay Mr. Steinfeld anything for that share of stock in December?

A. No, sir; no money.

Q. Didn't pay him anything.

A. No.

Q. Now, this certificate of stock that Mr. Steinfeld handed you was the identical certificate you had indorsed before?

A. Unless I am very much mistaken it is; I am certain that it is the same share.

170 Q. I say the certificate that Mr. Steinfeld handed you in December, 1903; Mr. Shelton, the certificate of stock that was handed you by Mr. Steinfeld in December, 1903, after the trouble between Mr. Steinfeld and Mr. Zeckendorf commenced in regard to the Silver Bell Copper Company you have referred to, is the same certificate you have referred to as having been indorsed in blank by you a number of years before?

A. Yes, sir.

That certificate was presented or handed to me by Mr. Steinfeld after the trouble with Mr. Zeckendorf had commenced in the Silver Bell Company and I paid Mr. Steinfeld absolutely nothing for that certificate.

Q. Or anything else?

A. Unless it was because of my—I had kept up the minutes and that sort of things. Aside from that I had done nothing.

The dividend referred to on that stock was the dividend declared January 26th, 1904, of \$111.

By MR. HENEY:

I hadn't been paid anything at any time by the Silver Bell Copper Company, or any one else for keeping its minutes, or for attending as a director.

171 Q. Had you consulted any with Curtis during the time you were a director in regard to the affairs of the corporation.

A. Well, Mr. Curtis and I had always been very friendly. I spent a good many hours at his office, and we have spent a very great deal of time together, talking over all his mining properties and all his work.

Q. How about this property?

A. Well, a very great deal of the time.

By MR. MESERVE:

During all of that time I was in the employ of and receiving a salary from the firm of L. Zeckendorf & Co.

Q. Do you remember testifying at the time of giving your deposition, that during the years 1901, 1902 and 1903 up to the time that stock was divided, that that share of stock belonged to L. Zeckendorf & Company?

A. Well, I believed that it did; I don't remember whether I testified or not; nothing had been said to me. That is the way I understood it.

I had given its ownership little or no thought; I knew it was in my name, but as I say, I supposed it belonged to the firm.

172 I was manager during all of that time of the hardware department of L. Zeckendorf & Co. And that included the handling of powder and what are known as mining supplies. And in this way I came directly in contact with Mr. Curtis in regard to the purchases for the Silver Bell, and such things.

LOUIS ZECKENDORF, being recalled to the witness stand, testified in his own behalf, as follows:

I came to Arizona first after the sale of the Silver Bell Copper Company's properties in October, 1903; I had conversations with Mr. Steinfeld during that time. I had conversations with him in reference to the minute book. I arrived in Tucson in the beginning of October, and had conversations with Mr. Steinfeld very frequently. I asked him for the minute book and he said the minute book is not here. I said, where is it; he said it is in San Francisco. I said, how dare you send such an important document outside of the Territory. He said, well, for this reason; Mr. Heney, he is studying up the case against Franklin, and it was absolutely necessary for him to have the minute book. I said, why don't you send him a copy. He said, well the book contains a great deal of writing and it would have been very laborious to send a copy or to make a copy. I said, I want to see that minute book. Well, he says, I will write to Mr. Heney about it; he said it is very hard to reach Mr. Heney.

173 which was at that time when he was chasing the government forest stealers. And I said did you write to Mr. Heney, and he said, yes; but it is very hard to reach him. So, one day I picked

up a San Francisco paper and I see that Mr. Heney had returned from one of his hunting trips and I showed the article to Mr. Steinfeld; and said, Mr. Heney is in San Francisco, and I would like to have that book. Well, I will write him. So a couple of days, or some days afterwards, when I thought the book was due, I said, has the book arrived, and he said, No, I think it will be here tomorrow. I asked him again the next day and he said tomorrow it will be here. Well, I thought that was manana. I kept on demanding this book, and one day Mr. Steinfeld said the book did not arrive, but I have got a letter from the assistant of Mr. Heney who said that he suddenly had to go to Washington and he had taken that minute book with him to Washington; and Uncle Louis was left again, so I had other conversations with Steinfeld; I wanted to see the documents. I was in the dark; I didn't know what was going on. So I went in the office one day and said look here, Albert—

I had no Uncle Louis to educate me, but I tell you one thing, anybody who takes me for a fool is badly left. My interest in that Silver Bell is equal to yours, isn't it; he says, yes. Now, I want to know why you keep \$160,000 in your possession and I have no benefit of it; tell you what I do; you take half the money, the half due to you and I take half of my money, and we pay all our debts; that is business. Well, he said, I tell you, I have specific arrangement with the company. I say, what do you mean, who is the company, you and Curtis; he said, yes; well, I said, you can't deal with yourself. Well, I said I have never taken any legal advice about it, but common sense tells you you can't deal with yourself, and I want to meet you, and the next payment you arrange it that I get \$50,000 out of the next payment, the next note, three months later you arrange for me to get \$25,000 and the next \$25,000 more on account. Well, he says I have got to see my lawyer; and his lawyer was out of town, so he told me. So then I went and I saw things were going on in that way, could not get any satisfaction, could not get any books. I went to San Francisco, I had heard that Mr. or rather Senator Ives, Honorable, and Mr. Steinfeld had made a trip to San Francisco. I had written a letter to the Bank of California which had at that time the three notes, and one *one* of them recently paid a hundred thousand dollars and something. I telegraphed them not to turn that money over to Steinfeld; that a large portion of that money was mine. In the meantime I engaged Judge Barnes who wrote a letter to the bank not to pay out this money to Steinfeld. I went to San Francisco the day after.

175 Well, I went to San Francisco; I went alone, all right—meeting in San Francisco. I went to the Bank of California and saw the vice-president of the bank. Mr. Lilienthal, my attorney, went with me, to give me introduction. I met Mr. Steinfeld and Senator Ives in the bank, on the same day I arrived there, and there was present myself, the vice-president of the bank, Judge Allen, the attorney for the Bank of California, and Mr. Lilienthal. In that conversation Mr. Lilienthal and Senator Ives done the talking, most. Mr. Lilienthal said I am in the dark; I don't know.

Prior to this conversation there was no attachment. Now, don't interrupt me and let me have my yarn. Mr. Lilienthal said that it was absolutely necessary, gentlemen, that you produce the minute book. I don't know what you have been doing; I must see that minute book; and Honorable Ives stood up and said, you can't see the minute book; it is against the law in Arizona to show a stockholder the books. He made a very nice speech. Judge Allen says: Now, Mr. Ives, it is very surprising to me; I don't know the laws so particular of Arizona, but it is the first time in my life that I hear that shareholders are not entitled to see the minute book. Well, that is the law in Arizona, all right. And Mr. Lilienthal insisted upon seeing the minute book. Then Senator Ives

176 came down; now I tell you I want to meet you half ways: I have got the minute book, and I will let you have the minute book for one hour on condition you don't make any copies. Mr. Lilienthal said: Mr. Ives, I won't make any condition of that kind if I see something which is useful to me, I will take it out, and I will tell you that beforehand. I have got a right to see the minute book. All right, he says, I will let you have it for one hour. He says, all right; I would like to have it, I want to see it and the book was forwarded to Mr. Lilienthal. That is all the conversation had at that time; and the next morning was again at Mr. Lilienthal's office.

The next morning at the meeting in Lilienthal's office, Senator Ives was there, with his client and Mr. Lilienthal was present and I was present. Senator Ives commenced by making a little speech.

Well, that was what was done. He came out in this way. Gentlemen, before we go further, he says; we want you to understand that Mr. Zeckendorf made a terrible mistake; he claims one half of the three hundred shares. I want to tell you right now that Mr. Zeckendorf made a greater mistake by claiming one half of those 300 shares. He is not entitled to one-half of those shares; those shares belong to the Silver Bell Copper Company; and Mr. Lilienthal

says, Senator Ives, I tell you; we don't want to deprive Mr. 177 Curtis of his share of that stock, and if you say, if you claim that that stock belongs to the company, let it go that way; but then let us see right now what the interest of Mr. Zeckendorf is in the Silver Bell. He says, all right; we will figure it out.

Mr. Steinfeld took a sheet of paper and a pencil and so did Mr. Lilienthal and they both figured. Mr. Lilienthal he came out first. He says, the interest, according to your statement of Mr. Zeckendorf is twenty-five seventieths. Mr. Steinfeld said I have got it different, your interests is only 257 and 1-7 shares. Well, Mr. Lilienthal says, that is correct; one amount is just like the other; that is the correct amount, and so it was accepted. After that Senator Ives thought the best thing would be if we could not compromise matters, and he walked in and out of the room with Mr. Lilienthal. What occurred between them I don't know, but Mr. Ives returned and says, Mr. Zeckendorf, I make Mr. Steinfeld give you this moment a check for \$32,000; and Mr. Lilienthal said, Mr. Ives, I am surprised that you make a proposition to Mr. Zeckendorf

of that kind while I, his lawyer, am present; do you thing I allow Mr. Zeckendorf to receive \$32,000. Mr. Zeckendorf shall not accept one cent except it comes through legal channels of dividends for Mr. Zeckendorf is entitled to dividends. And so we had various meetings, and I remember that one of the conditions were an agreement that the money which was then in the Bank of

178 California \$250,000 should remain in the hands of the bank, and if it was drawn from the bank it should be placed to the credit of the officer, the treasurer of the Silver Bell Copper Company and hold it for the company, but not in the name individually of Steinfeld. Steinfeld was holding then this money in the bank in his own individual name. The other condition of the agreement was that I should become one of the directors being a large shareholder, not Mr. Shelton, being the dummy of one share; he should resign. Well, when it came to that point all negotiations broke off. Senator Ives remarked that would not be congenial. I think we had two meetings or three perhaps; I am not positive about that.

Then I came back to Tucson. I didn't speak to Steinfeld since that. I had no conversation with any person or persons, I mean up to the time of that meeting of the stockholders. I have seen them separately; I had occasion to speak to them.

I went to Mr. Ives and demanded the books, the minute book. He said he had it but would not show it to me. That was all I remember that occurred at that time.

Well, some days later I think it came through Judge Barnes who informed me that Senator Ives was willing to show me the

179 minute book, and went to Mr. Ives' office and he showed me the minute book, and I examined it. I had no conversation with Mr. Ives or Mr. Steinfeld after that up to the meeting of December 26th, which we will call the stockholders' meeting.

I attended the meeting at the office of Smith & Ives in the afternoon of December 26th, 1903, where I and Mr. Ives and Judge Barnes and Mr. Steinfeld, Mr. Shelton and Mr. Curtis were present.

Mr. MESERVE: It is claimed that this transcript is a correct transcript of every word that was said there, taken down by Mr. Hartman in shorthand.

Q. Now just take that document in your hand and I will ask you to look at that, and see if that is the same paper that Mr. Ives had in his hand at that time of that meeting?

(Paper handed witness).

A. I don't say that it is the identical paper but it is a copy.

Q. We will assume now that to be the identical paper for the purposes of the case; it is a carbon copy.

A. Yes, a carbon copy; I read it, and it was a copy of my complaint I had made in San Francisco.

180 Q. Now, I call your attention in that complaint to certain resolutions copied into that complaint and would ask you whether or not those resolutions were read by Senator Ives at that meeting?

A. Yes.

Mr. MESERVE: I will now offer pages 59, 60, 61, 62, 63 and 65 and 66 of this minute book of the Silver Bell Copper Company.

Mr. Meserve reads from the minutes.

I will also read from pages 67, 68 and 69.

The paper headed Louis Zeckendorf vs. Albert Steinfeld the complaint in my case brought in San Francisco was the paper which Senator Ives then had in his hands at that meeting. He had another paper in his hands at that time so far as I know. He had a copy of an agreement, which he wanted to paste in the minute book.

That is a copy that is pasted in the minute book. I didn't see any other document.

Mr. MESERVE: We now offer in evidence the complaint or copy of the complaint which Mr. Ives had in his hands at that time and at the meeting.

181 Mr. HENEY: So that it won't be overlooked, let us offer the balance of the minute book right now.

Mr. HENEY: It is stipulated there is no laches; and that he did not ratify any act by any action subsequently taken to the claimed action of the board of directors or the act of division.

I first learned of the contents of the document, which we refer to in this case as the Steinfeld option, for the purpose of identification, dated July 15, 1901, at the trial of the Franklin case about a year ago, in June. Prior to that I didn't know anything about it except the reference given to it in the minute book. I made an effort to learn its contents. Mr. Lilienthal demanded it and Mr. Ives said he would send it as soon as he arrived in Tucson. If I recollect correctly it referred to two of the contracts. One was the contract of the option and the other was the contract which was subsequently rescinded on May 20th. I didn't get to see that option. The other agreement I saw; Mr. Ives sent it to me. I don't remember whether any effort was made by Mr. Hereford or yourself to see that option of July 15, previous to the bringing of this suit.

182 Q. You would only know by hearsay, anyhow, I suppose?

A. Yes.

Q. Mr. Zeckendorf, in the stockholders' meeting, and in the meeting where the discussion was had prior to the stockholders' meeting, on December 26, 1903, Mr. Ives refers to a letter and a copy of a resolution which had been sent to you; I now show you a letter addressed on the letterhead of Smith & Ives, dated December 19, 1903, and a copy of the resolution, and ask if this is the same paper to which Mr. Ives referred?

Mr. IVES: I admit that it is.

Mr. Steinfeld sent me statements very rarely of the account of L. Zeckendorf & Co., with the Silver Bell Copper Company. He sent me in a letter statements approximately what the various concerns owed us. He did not send me statements showing what the Silver Bell Copper Company owed L. Zeckendorf & Co. in his letters he mentioned the amounts. As I can remember he would from time

to time say the Azurite mine owes so much; and this mine owes us so much; I never received any itemized statement of account.

I came to Tucson in January of 1901—the second day of January and left here about May.

183 Q. Now, what did you do here in general connection with the business of your firm? And with the enterprises with which it was connected?

A. Why, I looked after my affairs here; I looked into the matter as one partner would look into his business.

I looked into the conduct of the business. I would examine the expenditures—the accounts of the expenditures. In a general way I would take an interest in the employes. The employing and discharging of men from the firm I left entirely to Mr. Steinfeld. I remember now that a certain clerk in the store I requested Mr. Steinfeld to discharge. I think that I recommended to Mr. Steinfeld that he discharge a clerk named Campbell. I can't tell exactly when that was except if I refer to my copy books. I said to Mr. Steinfeld when I asked him to discharge Campbell, in a general way I had reason to believe that this man Campbell was not honest. For that reason I recommended him to be discharged. I told him that the man ought to be discharged. I don't know if he discharged him. I think I had no particular conversation with him. I had a conversation with the assistant manager, Donau. I told Donau that the man ought to be discharged. He said he was a good dry goods man but that he was a big liar. Well, Mr. Donau thought it would

be a good idea to keep the man, because he was an excellent dry goods man. He insisted on sending him to New York to buy goods; but they sent another man to New York. In fact, I wrote to Mr. Steinfeld that if he sends that man to New York again, I would not permit him to buy goods. I said that to Mr. Steinfeld. I then dropped the question of discharging Campbell after this one conversation. I saw that Mr. Steinfeld would not discharge him, and I didn't want to interfere with the business; so left the man where he is.

I did speak about the discharge of another employe, the confidential bookkeeper, Mr. Meyers. That was about a year ago. I really can't remember that I suggested that any one else in the house be discharged. I don't think I asked Mr. Steinfeld to discharge Hugo Donau; I told him he was a very incompetent and treacherous man. I didn't discharge him; he took his discharge himself.

Q. Didn't you discharge Hugo Donau?

A. Perhaps so.

Q. Don't you know that you did?

A. Well, I remember—I don't remember just exactly whether I discharged him or not.

Q. When was it that you discharged him?

185 — Well, I think as I say, that I am not positive that I discharged him.

Q. Don't you remember that you discharged him in writing? Just refresh your recollection.

A. I remember that I wrote him a letter withdrawing the power of attorney.

Q. For yourself personally?

A. No; for the firm.

Q. Previous to your writing that letter he had a power of attorney for the firm?

A. Not from me.

Q. From the firm or from Mr. Steinfeld?

A. I suppose he did.

I had conversations with Mr. Donau before discharging him about his leaving the firm. These conversations were had generally in the store in the presence of other people. In these conversations with Mr. Donau on one occasion I displayed feeling and earnestness. I spoke with emphasis. I spoke very loud. This took place in the office of L. Zeckendorf & Company.

Q. You spoke loud enough for the other employes to hear it?

186 A. I suppose they could have heard it.

I believe that some others did hear me. As a result of these conversations which I had with Mr. Donau and of the letter which I wrote him, Mr. Donau left the employment of L. Zeckendorf & Company. Hugo Donau is a brother-in-law of Albert Steinfeld.

I had this conversation and wrote this communication to Mr. Donau I think in the spring of 1901.

Q. You have testified that you received certain letters from Mr. Curtis, which are in evidence, with respect to valuable finds that he was making on the English group of mines—on the Silver Bell purchase?

A. I know that he meant the mines of the company. I thought they bought some mines out there. I thought he bought the mines which he meant in that letter. I do not know in a general way what mines he referred to. No. They had so many mines that I don't know the names of them.

Q. Now, Mr. Zeckendorf, you have received a great number of letters. Did you know what mines were called the Silver Bell group of mines?

A. Well, Mr. Curtis sent me once a list of some forty-odd mines which belonged to the Silver Bell Company. Well, I mostly paid attention to the Old Boot mine and the rest of them I didn't
187 think were of any great consequence. All the correspondence to me was about the Old Boot mine. I didn't pay much attention. I remember once, Mr. Curtis wrote to me or Mr. Steinfeld and said they had located some twelve mines which the company owned—which Mr. Curtis had located for the company.

Q. Do you remember receiving a number of letters from Mr. Steinfeld prior to August, 1900, and when Mr. Steinfeld went to Europe, in which Mr. Steinfeld spoke of the great importance of purchasing this English group of mines?

A. Yes, sir, I remember he referred to that at various times.

I remember his writing to me a short time prior to August, 1900, to the effect that he ought to have gone to Europe the preceding

summer in order to purchase these English mines. I knew that he went to Europe. I saw the mine for the first time in 1899. In January, February, March, April or May, 1901, I went to the mines with Mr. Curtis. It might have been along there; it might have been 1902. I am not positive. I know I went there either in 1901 or 1902. If I recollect right, I think Mr. Curtis was making a map at the time I was there, or he was making a copy of a map. He was tracing one.

188 Q. Now, Mr. Zeckendorf, didn't the map which Mr. Curtis showed you have on it substantially all the claims that this map, defendant's exhibit "A" has on it. The map he showed you at the mines early in January, or sometime between January and May, 1901, didn't the map which Mr. Curtis showed you at the mines between the first of January and the first of June, 1901, have on it substantially all these claims which appear on this map. (I am referring to defendant's exhibit "A.")

A. I don't remember that I saw any map like it. I did not go down into the mines. I did not. I stayed at the top of the shaft while Mr. Curtis went down. I remember that Mr. Curtis showed me the country there with his hands all around, north, south, east and west. He did not show me where the ore croppings were. I don't remember his pointing out to me that the ore croppings ran in this direction or that direction. It came about this way, how Mr. Curtis explained to me. I heard there were some claims in dispute between the Silver Bell Copper Company and some property owned by Mr. Elliott I believe, and I asked Mr. Curtis, where are Elliott's mines, and Mr. Curtis pointed out and said, right on the hill there are the Elliot mines. He said the title is in dispute.

189 When Mr. Steinfeld returned from Europe he did not tell me that he had purchased certain mines when he was in Europe. Before he went to Europe he said he was going to try to buy some mines. He said he went there to look after our mining interests, but he didn't enumerate any properties. I knew that Mr. Steinfeld thought about purchasing some mines in Europe when he went there that summer, in the vicinity of the Old Boot. That is what he always said he should do. He had written once that it was very important that he should purchase these mines. He said so to me not a great number of times but at various times. I don't remember any conversations I had on that subject with Mr. Curtis. I don't remember any conversations had on the subject. The fact is I left all this mining business with Mr. Curtis. I didn't bother my head with it. Knowing that it was very important that these English mines should be purchased and knowing that Mr. Steinfeld went to Europe for the purpose of purchasing them I did not make any inquiry after he returned from Europe as to whether he purchased them or not. I saw him in New York on his way back from Europe. He never said a word about it, and I didn't ask him whether he purchased them or not.

Q. Yet you received a number of letters from him saying how important it was that these mines should be purchased.

190 A. I took it for granted that it was so because he didn't tell me so.

And I never thought it necessary to ask him a question or anything about it, or whether he had failed in making a purchase. I swear that Mr. Curtis did not tell me that Steinfeld had purchased these mines in England. I don't remember any time that Mr. Curtis showed me a map except on one occasion when Mr. Curtis had a map in our furniture store, and he called me and Mr. Steinfeld over there and wanted to explain certain matters and he explained to us that it was very dangerous to go into the mine as it appeared that he was striking zinc ore and if so, it would be very detrimental to the property. It must have been after we owned the Old Boot. It might have been 1901, 1902, 1903, or I don't know which one of these occasions it was, but I remember Mr. Curtis explaining the map. I say that When Mr. Steinfeld returned from Europe I saw him in New York, and that was in December 1900. I left New York in December, 1900, and arrived here on January 2, 1901. Then I went out to the mines and looked at them. I don't know whether it was that year or the year afterwards, except by consulting my memorandum.

I wrote that letter to Mr. Steinfeld. Its date is February 7th, 1901. It is headed, Tucson. It was sent to Mr. Steinfeld at San Francisco, California.

191 Mr. IVES: I offer this letter in evidence.

Letter admitted, read and marked "Defendants' Exhibit E."

I wrote that letter.

Mr. IVES: I offer this letter from Mr. Zeckendorf to Mr. Steinfeld in evidence. It is dated Tucson, February 19th, 1901, and is addressed to Mr. Steinfeld at San Francisco.

Letter admitted in evidence and marked Defendants' Exhibit "F."

Q. Now, Mr. Zeckendorf, refresh your memory with this letter. You did see maps when you were there, did you not?

A. Not maps.

Q. Your letter says maps. That was not true then what was stated in your letter?

A. I don't want to say that.

Q. Just look at that and see that is maps?

A. Yes, that says maps.

192 Q. And you still say that Mr. Curtis at this time *time* didn't show you the way in which the croppings lay in the mines which Mr. Steinfeld had purchased?

A. I do not.

I said that when Mr. Steinfeld returned from Europe, the fact that he didn't mention that he bought the English mines made me think that he didn't purchase them.

Q. Then when Mr. Steinfeld returned from Europe you did have in mind after his return the fact that he had contemplated that in England?

A. I didn't think anything of it.

Q. Did you not just say a few minutes ago that the fact that he didn't mention it to you made you think at that time that he had not purchased them?

A. Yes, sir.

Q. Then you did have in mind the subject whether he had purchased them or not?

A. I didn't pay much attention to it.

Q. Now, you remember while you were at the mines with Mr. Curtis in February 1901, that Mr. Steinfeld had written you many letters about the great importance of acquiring these English properties?

193 A. He wrote me some letters.

Q. Didn't it ever occur to you to ask Mr. Curtis where these mines were that it was so important should be purchased?

A. I don't remember anything of that kind.

Q. I am reading from a letter now dated March the 26th, 1900, from Mr. Steinfeld to you shortly before he went to Europe in which Mr. Steinfeld says: "We are now shut down over two months, not on account of lack of ore or prospects in the mines. Unfortunately the ore body drifted directly into the English claims and we stopped within twenty feet of the English line of their claims." Do you remember that?

A. Certainly.

Q. Didn't it occur to you to ask Mr. Curtis where were these English claims when you were there in February, 1901?

A. I am not a mining man.

Q. It didn't occur to you to make an inquiry about that?

A. I don't remember anything of that.

194 Q. Your purpose in going to the mine was to examine into your interests there?

A. I went there to look at the Old Boot.

I certainly went there to look after my interests there. I remember Mr. Steinfeld in that same letter he wrote to me saying that he wanted to secure these claims referring to the English claims, that they were then about twenty feet from the English claims in the Old Boot workings, and that acquiring these claims then became imperative. I was certainly very much concerned about the large indebtedness to L. Zeckendorf and Company on account of these mines. Sometimes I was very nervous about it, and I was very much worried that the debt kept constantly increasing.

Q. Your reason for going up there was to look into the conditions of the property, and yet you mean to say that when Mr. Steinfeld had written to you that it was imperative for you to get these claims, you didn't ask a single question when you went out there?

A. I did not.

When I came out in January, 1901, I procured the stock book of the Nielsen Mining and Smelting Company, and I had it in my possession in 1901.

195 Q. When I had that in my possession I wrote out a certificate of stock to Albert Steinfeld, trustee, and before I wrote out

that certificate of stock to Albert Steinfeld, trustee, I inquired from Mr. Steinfeld, if the original certificate was to Carl Nielsen for 300 shares. I asked where it was and Mr. Steinfeld gave it to me. The certificate was endorsed in blank at the time by Nielsen.

Q. Was your object in writing out that certificate to Mr. Steinfeld, trustee, the fact that you mistrusted Mr. Steinfeld that he might want to keep that certificate for himself?

A. I have stated before that I proposed to cancel this 300 shares entirely and reduce the capital stock from 1000 to 700 shares, and that Mr. Steinfeld objected to this, and by his request and instruction, I made out this certificate, that is, I wrote out the blank. And I wrote out the 300 shares and he requested me to write out the 300 shares in his name as trustee and he would hold these 300 shares for the company on account, that he jointly had assumed responsibility with the Silver Bell Copper Company to pay the Nielsens \$10,000 and for that reason he wanted to hold it on trust.

I wrote that memorandum on the back of the stub on that certificate, in which I stated that Mr. Steinfeld held that as
196 trustee for the Nielsen Mining and Smelting Company. I told Mr. Steinfeld that I would write that on the stub.

Q. What was your purpose in writing that?

A. Just what it meant.

Q. What was the necessity for writing it?

A. I wanted it to be insisted that the stub belonged to the company and to nobody else.

My purpose very likely was that Mr. Steinfeld could never claim that for himself, and that it belonged to him. I thought very likely that in spite of the conversation I had with him, he might at some later day claim that he owned that stock.

Q. Was Mr. Steinfeld present when you wrote out that certificate of stock?

A. I was there in the office.

I showed it to him. I showed him the whole thing.

Q. Then if your purpose was for fear that Mr. Steinfeld might claim it, why didn't you make him sign it?

A. It was not necessary.

197 Q. Wouldn't that make it more certain?

A. I am not a lawyer.

Q. You consulted Mr. Franklin, did you not?

A. I did.

Q. Did you consult him about having Mr. Steinfeld sign that?

A. I thought it was all right.

Q. If you had an oral transaction don't you think it is necessary to make a memorandum of it and don't you think it's necessary that the party should sign the memorandum.

A. That depends on whom you are dealing with.

Q. Wouldn't you ask a person in whom you had absolute confidence to sign it?

A. I didn't think it was necessary for anybody to sign it. The endorsement was sufficient. That was the way I construed it.

When I came back from the mine, or before I went to the mine

in February, 1901, I examined the books of L. Zeckendorf and Company in a way. Most likely I examined the account of 198 the Silver Bell Copper Company with L. Zeckendorf and Company. I think I remember doing so.

Q. Did you find any charge there for the mines that had been purchased—for the mining claims that had been purchased by Mr. Steinfeld?

A. I didn't go into the details of the account.

Q. You went into it far enough to make you very nervous about the large amount of indebtedness, did you not?

A. Well, sometimes it does make a man nervous.

The firm of L. Zeckendorf and Company was never organized for the purpose of engaging in mining speculations and enterprises? I did not think that it was a good business at all for Steinfeld as the managing partner of L. Zeckendorf and Company to admit of such a large indebtedness being incurred in the mining business and I told him so.

I told Mr. Steinfeld that I thought it was bad business for him as managing partner of L. Zeckendorf and Company to permit such a large indebtedness to be incurred in a mining venture. I might have told him. I didn't think it was conservative enough for our business. I did not object to such a large indebtedness, the objection came from him.

199 Q. You never objected at all to the amount of the debt?

A. He always wrote me that it was a mistake to invest so much money in outside business and that we ought not to do it. The business would not stand it. When we went into the Old Boot, Mr. Curtis and Mr. Steinfeld reported to me that if we had the Old Boot the property would take care of itself. Then the Silver Bell Company and the Nielsen Mining Company owed us about \$18,000 in a round sum, probably \$20,000. I was assured by Mr. Curtis that the mine would surely take care of itself and that it would not be necessary for us to make any further advances, and that the mine would earn enough dividends to take care of itself, then as a matter of course, that account crawled up from \$20,000 to \$100,000 and I was surprised at it.

I had conversation with Mr. Lilienthal in San Francisco with respect to the 300 shares of stock at which Mr. Steinfeld and yourself (Ives) were not present:

Mr. Ives:

Q. You stated in your direct examination that I promised to give Mr. Lilienthal in San Francisco a copy of the proposition which

Mr. Steinfeld made to the company dated July the 15th, 200 1901, is that correct?

A. Why, I will not state that I remember exactly the date of these documents, but there were two documents which Mr. Lilienthal requested Mr. Ives to give him. One was an option and the other was an agreement, and Mr. Ives said I have not got it with me here, but as soon as I get to Tucson I will send you a copy.

I am familiar with Mr. Lilienthal's signature in some ways.

Q. (Handing witness a letter) Is that Mr. Lilienthal's signature?

A. It looks like it, I am not a handwriting expert.

Mr. Ives: This letter is dated San Francisco, California, December the 2nd, 1903. It is from Mr. Ives to Mr. Lilienthal and I offer this letter in evidence. There is a pencil memorandum on the bottom of it in my own handwriting. I do not offer the memorandum in evidence.

In the conversation at San Francisco between myself, Mr. Lilienthal, Mr. Steinfeld and Mr. Ives in Mr. Lilienthal's office it is a fact that I claimed that the 300 shares of stock in question belonged to the firm of L. Zeckendorf and Company. I did claim half of the 300 Nielsen shares. I refer to the 300 shares of stock issued by the Nielsen Mining and Smelting Company, afterwards known as the Silver Bell Copper Company, to Albert Steinfeld, trustee. After Mr. Steinfeld returned from San Francisco to Tucson in 1901, I went to the mines in February, 1901. Mr. Steinfeld was then at San Francisco.

Q. After he returned from San Francisco in 1901, did Mr. Steinfeld ever speak to you about him acquiring any of the English mines in the future?

A. I don't remember that. That was four years ago.

Q. Did he say anything about the prospects out there at the mines in the spring of 1901, after his return from San Francisco and before you left for New York?

A. Well, in a general way, I think he did. He told me the prospects were good.

Q. Now, before he went to Europe, he wrote you many letters about the necessity of acquiring these English claims, didn't he, and did it not occasion you some surprise that he never wrote you there after about acquiring them?

A. It did not.

Q. Well, did it never occur to you that the ore which was only 20 feet from these English mines might have gone into the English mines?

A. I paid very little attention to it in that direction. I did not ask Mr. Steinfeld or Mr. Curtis whether the ore had gone into the English mines.

I did not ever ask Mr. Steinfeld after January, 1901, whether he still feared that the ore might run into the English mines. I never knew anything about the English mines. I did not ever ask Mr. Steinfeld whether he still feared that the ore in the Old Boot mine might run into the adjoining claims that were owned by the Silver Bell Company.

Q. Did you ever ask Mr. Curtis whether he feared that the ore in the Old Boot property would run into the adjoining claims?

A. I don't remember any such conversation. I had other matters in my head.

Q. I am referring to the time when you were at the mine?

A. It was to me only a side line.

I did not have any other matter occupying my mind at that time which involved the loss of as much as \$100,000.

203 Mr. MESERVE: Did you understand that to mean that you had other matters that involved the loss of \$100,000?

A. No, sir.

Mr. MESERVE: State what you understood the question to be and answer?

A. I understood it meant the risk of a loss.

I remember that I had received letters from Mr. Steinfeld in which he said that one of his reasons for shutting down the mine before he went to Europe was that it was imperative, first to purchase these English mines.

Q. Well, now, you found that the mine had started up again—that the mine was at work again when you were out there?

A. I really don't remember.

Q. Don't you remember that the smelters were running? Do you remember about writing to Mr. Steinfeld?

A. Well, that might be so.

Q. Did it ever occur to you in view of the fact that the mines had shut down because it was necessary that the English mines be purchased on account of the ore running into them or within
204 twenty feet of them, and in view of the further fact that work was now going on in the mines, I say, did it never occur to you in view of such facts to inquire of Mr. Steinfeld why he had opened the mines up again, if he did not purchase these English claims?

A. I paid no attention to it.

I left here in May 1901. I was here in 1902. I came here in January, 1902. I generally stay here about 3 or 4 months. While I was here in 1902, I examined the books of L. Zeckendorf and Company. I examined the account of L. Zeckendorf and Company with the Silver Bell Copper Company. I did not look at any of the books of the Silver Bell Copper Company in 1902. I did not see the minute book in 1902 of the Silver Bell Copper Company. I did not know where it was.

Q. Didn't you say to Mr. Heney that it was in the private office?

A. That was in former years, when they first incorporated this Nielsen Company. In the same office I saw the minutes of the Nielsen Mining Company.

Just after the first meeting I saw the minute book. At that time I examined the minute book and read their by-laws, too. They
205 only had one meeting and I read that. This was at the time I examined this stock book. I looked at the minute book when I wrote on the back on the stub on that trip. I don't think I saw the minute book at the time. I took the stock book. I found it in the safe; it was not wrapped up; it wasn't wrapped up in a package with the minute book; it was all by itself. I never saw them tied together.

At the conversation, the first conversation that occurred between Mr. Lilienthal, myself, Mr. Steinfeld and Mr. Ives at which one of the officers of the bank, Mr. Anderson, and I think Judge Allen, attorney for the bank, were present, at the bank, on the 2nd day of December, 1903, I do not remember that at that conversation we discussed the fact that this attachment had been issued.

My impression is that at the first meeting that although the papers were ready to attach the money in the bank, they were not served yet, and the man who was to serve the papers missed Mr. Steinfeld coming out of the bank; so as my impression is, at that time we had the first meeting no legal service was had at the bank; it was afterwards.

Q. Do you remember a conversation held at the bank at which such persons were present, of Mr. Lilienthal saying that he was then preparing a complaint in a stockholders' suit in which he
206 asked for an injunction, restraining Mr. Steinfeld from getting the money?

A. There might have been something like that.

Mr. MESERVE:

Q. What did Mr. Lilienthal say?

A. He said that he would prepare papers to prevent the bank from turning the money over to Mr. Steinfeld. And then Oh, yes, sir—Mr. Ives said: Well, in that event, we can give bonds.

Mr. IVES:

Q. At this conversation I spoke about giving bonds?

A. Yes, sir; you said in that event we can give bonds.

Q. Didn't Mr. Lilienthal say at that time that he had dictated a complaint in such an action, and that it was being prepared by the clerks in his office at that time?

A. Well, we can't say that he said that.

Q. And that it would probably be ready before I could get the attachment released?

A. He spoke of the papers being served or to be served.

207 Q. He spoke of papers to be served?

A. Yes, sir.

Mr. IVES: I offer in evidence a copy of the complaint brought by Louis Zeckendorf against Albert Steinfeld, the Bank of California, the Silver Bell Copper Company, J. N. Curtis and R. K. Shelton, it appears to have been filed December 8, 1903; that is the complaint in the injunction suit.

I remember of swearing to the affidavit that the facts stated in that complaint were true.

Q. Now, Mr. Zeckendorf, I read from Defendants' Exhibit "I," which is your affidavit in the attachment suit brought in San Francisco. Louis Zeckendorf, being duly sworn, says: That he is the plaintiff in the above entitled action; that the defendant in the said action is indebted to him in the sum of \$65,200 in legal money of the United States, upon a contract for the direct payment of money by the defendant to the plaintiff.

When you swore that Mr. Steinfeld was indebted to you for this \$65,200 you were referring, were you not, to the proceeds of the sale of this Silver Bell group of mines?

A. Yes, sir.

208 I now believe that Mr. Steinfeld was then indebted to me in the sum of \$65,000 of the proceeds of the sale of the Silver Bell group of mines.

Q. In the injunction suit which you commenced in San Francisco, you stated that the Silver Bell Copper Company owned at that time all of the proceeds of the sale of that group of mines; do you believe that the Silver Bell Copper Company at that time, the time when you brought this stockholders' suit in San Francisco, owned all the proceeds of the sale of the Silver Bell mines?

A. I do; yes, sir.

Q. Then if the Silver Bell Copper Company owned all of the proceeds of the sale of the Silver Bell mines at that time, how did Mr. Steinfeld personally owe you \$65,000?

A. Because he was the treasurer.

Q. And held it for the company?

A. He should have.

Q. Had any dividends been declared?

A. None.

209 Q. Did he owe you personally any money whatever out of the proceeds of that mining sale, as trustee of the Silver Bell Company?

A. He did.

Q. Isn't it a fact that you knew that Mr. Steinfeld personally was not indebted to you in the sum of \$65,000 as a part of the proceeds of this sale at the time you made this affidavit?

A. He was indebted to me because he took that money for himself.

Q. Isn't it a fact that you caused this attachment suit to be instituted, and signed this affidavit in attachment because you wanted to get out a warrant of attachment to hold the notes and the money until Mr. Lilienthal had time to prepare his complaint in this stockholders' action and get an injunction; and isn't it a fact that this suit was instituted for temporary purposes to hold these notes and that money in the bank until Mr. Lilienthal had time to get an injunction?

A. Very likely.

Q. Therefore, when you swore that Mr. Steinfeld was indebted to you \$65,000, didn't you swear to what was not the case in order to prevent Mr. Steinfeld getting that money?

210 A. I swore to the fact, having been informed by the bank that Mr. Steinfeld didn't hold this money in the bank as trustee, but that he held it on his own account. Subsequently, for that reason, we attached the money as a portion of the money due me.

Q. When you instituted the attachment suit, had you already determined to commence a stockholders' suit for an injunction?

A. Already—the attachment suit was the first.

Q. And at the time you brought it did you not intend also to bring the stockholders' suit for injunction; did you not have the intention to bring the stockholders' suit for an injunction?

A. No; not at that time.

Q. Didn't Mr. Lilienthal state to me in your presence, that he had dictated the papers in the injunction suit, and that the papers would soon be prepared; I mean did he not state that at the bank?

A. I haven't heard it. I was some distance from Mr. Lilienthal and he might have said it and I did not hear it. I don't hear good.

I arrived at San Francisco, I think it was mostly noon; I know it was noon. I think it was the day before I met you on the street. I left here on the evening of the 29th of November; I might have got there on December 1st. My train was delayed three or four hours.

Mr. HENNEY: Mr. Zeckendorf, I call your attention to the book placed on the desk of the judge and ask you if that is one of the regular books of the partnership of L. Zeckendorf and Company?

A. Yes, sir.

That is the ledger. That is the ledger that was being kept in 1901; the same book of my own knowledge. I saw that book when I came out here, or while I was here from January to May, 1901. I looked at the Silver Bell Copper Company's account in there just as I do now, and with no more care nor interest than I do now. Simply at the footing of it; the footing showed the end of the book.

When I was here in 1902 I looked at this ledger and at the Silver Bell Copper Company's account. Just as I was looking at it now; I didn't examine it item by item. I looked over it to determine in a general way how much cash L. Zeckendorf and Company had been paying out during the time I was away, from the time I left in 1901 until I returned in 1902.

Q. Now then, do you see on page 231, of the date August 22, an entry: A. Steinfeld, Special Account, check 528, figures 270, \$1150.17?

A. I didn't notice that.

I didn't examine the items. I first saw that entry just now. I don't remember seeing the total on page 231 when I was here in 1902; it is in lead pencil \$83,954.64. From time to time I looked to see how much the total indebtedness of the Silver Bell Copper Company to L. Zeckendorf and Company was at that time in 1902. I did in 1902. I looked in the ledger for that purpose. I looked over the account for the purpose of determining how much cash, and for what purpose the cash was advanced by L. Zeckendorf and Company to the Silver Bell Copper Company. I had no other interest to look at it. I suppose I looked while I was here in 1902, at the personal account of Albert Steinfeld in the ledger. I looked at it for the purpose of determining what amounts, in a general way, of cash Albert Steinfeld had drawn during the time I was away, and what amounts he might have advanced to the Silver Bell Copper Company while I was away from 1901 to 1902, like I would examine any account. I don't remember the second entry in the account of Steinfeld, Special, on page 609; August 22, S. B. Co., 270 \$1150.17. I looked upon the account of Albert Steinfeld, Special, as a sort of trustee account.

Q. Why was it a trustee account. The account of Albert Steinfeld, trustee, was on the same page, was it not?

A. Yes, sir; I don't know what that meant.

Q. Did you ask Mr. Steinfeld what it meant?

A. The book itself shows what it was. There is nothing special

about it. I looked upon it as indicating the business of his private account.

Q. Was it a cash account showing the cash drawn out and paid in by Mr. Steinfeld?

A. The account speaks for itself?

Q. Does the first entry of that account, April 20, 126—what does that indicate to you as meaning?

A. It indicates to me that he expended that much money on the Mowry, or that the Mowry was indebted to him or to the firm. He charges himself with it, and I took it for granted that the Mowry mine got it from the firm.

Q. You say he charged himself with it?

A. He charged himself with it.

214 Q. Now, what do you understand that second entry to mean: August 22, Account S. B. Co. \$211.50?

A. I understand that now the same way, like the Mowry account. The Silver Bell Company was indebted to the firm of L. Zeckendorf and Company, which he assumed himself and charged to himself.

Q. Then it shows that he assumed and charged to himself \$1150.17?

A. Yes, sir.

Q. Did you see that item in 1902?

A. I don't remember now.

I never looked at the journal for that item.

Mr. HENEY: Now, we will offer in evidence the Special Account of Albert Steinfeld, as it appears on page 609, of the ledger of L. Zeckendorf and Company, being ledger No. 9.

Page 609 of ledger No. 9, referred to above is admitted in evidence and marked Defendants' Exhibit "L."

We offer this other account on page 232 of the same ledger.

215 Mr. HENEY: On page 233, instead of page 232—wait a minute—on page 231, it is. In order that the evidence may have its full effect, we want all of that portion of this account which appears in the second column here, and we will furnish a copy of it.

The COURT: It may go in subject to the objection.

Mr. HENEY: It is the cash account of the Silver Bell Copper Company.

Q. Mr. Zeckendorf, I show you now the cash book of L. Zeckendorf and Company; it is No. 14; that is the cash book of L. Zeckendorf and Company No. 14, is it?

A. Yes, sir.

Q. On page 221 I will call your attention to the second item on the page: 28-01; Silver Bell Copper Company; when you were in Tucson in 1902, did you examine this cash book?

A. In a casual way; yes, sir.

Q. Did you see these entries on page 221?

216 A. I don't remember that I did.

Q. Did you see the entry—the second entry on that page?

A. I don't remember of ever having seen it.

Q. This cash book was open to your inspection at all times while you were here?

A. It was; but any information that I wanted I would take from the ledger; I would concentrate it; I very rarely looked at the cash book.

Mr. HENEY: We will offer in evidence on that page 221—headed, it is page 221 of this cash book.

Admitted and marked Defendants' Exhibit "N."

Mr. HENEY:

Q. I will call your attention to page 270 of the same cash book, the left hand page, marked 270; printed figures 270, did you see that entry which appears there, next to the last entry on the page? It reads, Silver Bell Copper Company, charged to A. S. Special, Cks?, of 528, \$950.17; 200; total credited at \$1150.17?

A. I don't recollect of ever seeing these matters.

217 Mr. HENEY: We will offer this page in evidence, Admitted and marked Defendants' Exhibit "O."

Mr. HENEY: I call your attention to the credit side of page 270, of the same cash book, which is the fifth entry from the bottom and which reads: Spec. Tras. T. F. D. and S. Bell Cop. Co., \$950.17; total 1150.17; did you see that entry when you were here in 1902?

A. I did not.

Mr. HENEY: We will offer this credit page in evidence, Admitted and marked Defendants' Exhibit "P."

Redirect examination.

By Mr. MESERVE:

I had charge of the business in New York. That was part of my business and I also attended to the New York financial end of the business. I maintained the office for the firm there and lived there, and the business at this end was under the direct charge of Mr. Steinfeld. That firm did here in a year in the
218 neighborhood of a million dollars business; and the credits of all of that was arranged by Mr. Steinfeld.

I never heard the name before the commencement of this action of any of the so-called English group of mines. Nobody ever showed me and no maps were sent me to show me what mines it was thought that Mr. Steinfeld thought of purchasing. Nobody ever on any of these maps which were sent to me indicated that there was any difference in the ownership or source of title. I never inquired as to how, or through what source the title of these properties were acquired—the different properties of these maps.

Q. When you were out to the mine in February 1901, did Mr. Curtis, in pointing out to you the country, point out to you the property of the Silver Bell Company, or say here is the property of the Silver Bell Company, or say here is the property of Mr. Steinfeld, or what did he say?

A. That was never mentioned; I never knew that Mr. Steinfeld had any mines.

Q. Was there anything said like this: here is the Lewis property;

or here is the English property; or here is the Volkert property; was there anything of that kind said by Mr. Curtis; I mean when you was out there at the mine?

219 A. The only thing that I can remember, because I called his attention to it; I wanted to know where the mines were that were in dispute between Elliot and the company and Mr. Curtis pointed out to me the mountains, and said right here, where you see the mountains is where the Elliot mines are claimed.

When I was out at the mine Mr. Curtis was tracing a map of the Old Boot of the underground workings. He was not making the tracing of a map that looked like this on the surface (showing Defendants' Exhibit "A.")

Before I went to San Francisco I engaged Judge Barnes and I showed him our partnership contract and I explained everything to him and I told him that I wanted to secure the money in the Bank of California so that Mr. Steinfeld could not draw it, and then I explained to him about the three hundred shares and he said these 300 shares belong half to you, according to your partnership contract; and I said no, they belong to the company; and he said never mind; Judge said we will catch him in a trap; we will make him admit how many shares was due, then we telegraphed to the Bank of California and by direct instructions of Judge Barnes I have got a copy of that; I told him I didn't own 150 shares; but he insisted on doing it in this way; he said, you let me alone; so we telegraphed to the bank that these 300 shares of the Silver

220 Bell, that half of them belonged to me, and when I came to California I told Mr. Lilienthal about it; that we did make this claim for half of these shares; and Mr. Lilienthal said it was the cleverest thing I have ever seen in Barnes yet, to make a half of these 300 shares; and subsequently when Mr. Ives and Mr. Steinfeld came in, you know, the first thing Mr. Ives objected to my claiming half of these 300 shares; then he made the statement that these 300 shares belonged to the company and not half to me; and Mr. Lilienthal said it was all right; we don't want to deprive Mr. Curtis of his interest in this company; we are satisfied with it; that was the time they figured out; they said let's figure out exactly what interest Mr. Zeckendorf has in the Silver Bell Copper Company. Then the two of them figured and Mr. Lilienthal finished first. He said Mr. Zeckendorf is entitled to 25-70 in that company; Mr. Steinfeld said No; I have it different; I have 357 1-7 shares; Mr. Lilienthal says you compare these two and you will find one the same as the other. In other words, one figured on one basis and one on the other, and it figured out exactly the same. At the mine Mr. Curtis had on the table several sections of the underground workings of the Old Boot; I was sleeping in the same tent where Mr. Curtis had been making a tracing of the map; I could not say whether it was exact; it was upon a large piece of canvas upon which this map was made;

221 this is only a miniature. I don't know whether this is the map or not. It appears to me as a copy. In other words the lines run in the same general direction and there is the same general idea. Now, in this letter written by me from Tucson to Mr. Stein-

feld, February 19, 1901, being Defendants' Exhibit "F" in using the language, "I didn't go down in the mine but from the maps I have a fair idea how it must appear. I referred to these maps of the underground workings on the Old Boot, because I didn't want to go down there. Mr. Curtis thought he could facilitate me by showing me the map.

I think the day after I arrived in San Francisco began work on the attachment suit. At the same time I filed that attachment suit in San Francisco I understood that it was the money belonging to the Silver Bell Copper Company held in Steinfeld's own name in the Bank of California. I understood at that time that I was entitled personally to half of it. At the time that attachment suit was brought, at the time it was filed I did not contemplate filing the second suit. Perhaps a day or two after bringing of the attachment suit the discussion arose as to the bringing of the stockholder's suit; I mean the injunction suit. After we had seen the minute book Mr.

222 Lilienthal said, and before that, he told me that he was in the dark and didn't know how to take hold of anything like that, and he insisted upon me seeing the minute book; after he had seen the minute book, he said that if he had seen the minute book, he would not have brought the attachment suit; he would have brought the injunction suit at once; on that account I could not help myself as I didn't have the books to be guided by.

In bringing that attachment suit I was following the advice of Mr. Lilienthal the advice given on such facts as Mr. Lilienthal then knew.

This morning is the first time I saw or had my attention directed to this account of L. Zeckendorf and Company where these checks seem to have gone through the account. That was when the books were over on the corner when the bookkeeper was there—Mr. Culin was there. I first saw the entry in the cash book to which my attention was called by Mr. Heney this morning. I never saw it or had my attention called to it before it was called by Mr. Heney on the bench here. The account which was examined by Mr. Culin was the ledger account. That was the Silver Bell Copper Company account. I examined Albert Steinfeld's personal account before I examined it in connection with the questions of Mr. Heney this morning in the court room.

223 Recross-examination-

At the time I went out to Silver Bell in 1901, I went out here for the purpose of seeing in what condition the property was and what were the chances of getting my money back. That was the main part of it. When I got out there Mr. Curtis showed me a map of the underground workings because I didn't want to take the risk of going down into the mine at my age, and he explained it to me to some extent. To some extent he gave me some ideas of the property—the value of it and how it was going to come out and one thing and another. He didn't spend any time explaining why it was a big property and would be. I was interested in that. He is very much inclined to talk about mines; he is very talkative.

Q. He would tell you how the fissures were created and how the ledges were thrown up and everything about the formations and the mines?

A. Oh, yes, he could talk you to death.

We drove there that time.

Q. On the way out there didn't he give you a good deal of talk about the formations and such things?

A. Well, I think I was telling the yarns.

224 Q. You were telling funny yarns, were you?

A. Yes, sir; I was talking a good deal, too.

Q. You were feeling pretty good over the prospects of the mines and what he told you about them?

A. I always had great confidence in what Mr. Curtis told me.

Q. But you didn't care to hear anything on the particular subject of the mine?

A. Oh, certainly I did. I like to talk about it sometimes. But I knew I would get enough of it before I got out there with Curtis. I expected to sell these mines or find a purchaser myself.

Q. You didn't expect to talk to a purchaser or picture it as a nice proposition unless you knew something about it, did you?

A. Whenever I had a purchaser I submitted my reports.

Q. As a business man didn't it occur to you that you wanted to know as much as possible about the mines? Didn't you want to be in a position to talk to a purchaser about them?

225 A. I never claimed to be a mining man or to have any knowledge of mines.

Q. So it didn't occur to you that you wanted to know anything about it?

A. I wanted to know the general running of it, but I had great confidence in Mr. Curtis, and I believed that whatever he told me about the mine was true.

I always found Mr. Curtis to be honorable and upright in his dealings with me, to a certain extent I did. At that time I would have sworn by Curtis. I believed I stayed only one night. I think we came here one afternoon, and I don't think I stayed there more than one night or two nights. It takes about six hours to drive there; I don't remember whether I stayed one or two nights.

Q. When you stayed out at the Old Boot mine with Mr. Curtis, didn't Mr. Curtis launch out into a picturesque excursion of his ideas as to how these mines were thrown up, and how the ore got there, and all that?

A. It may have been.

Q. Didn't he point out to you where it run, in his opinion?

226 A. Yes, sir; he pointed out the whole mine.

Q. Didn't he give you his idea of where the ore was going to lead to?

A. He assisted me on the map to show me where the ore was running.

Q. Didn't he express any pleasure from the fact that the company had so recently acquired the adjoining claims?

A. He didn't speak of that. When he spoke of any other mines

outside of the Old Boot, I always understood that these were the mines which Curtis had located.

Q. Didn't he tell you that he had been afraid the Old Boot was going to run into some of those adjoining claims; that he had always been afraid because they didn't own the adjoining claims? And now that you had them all you had a fine property?

A. In fact, he said so much that I don't remember.

Q. If he did say that you don't remember of his saying how he got the other claims?

A. I don't remember that he said it. I never knew they had any mines except what Mr. Curtis located, except they bought
227 some claims—yes, I knew of one claim they bought from Nielsen and Lewis.

After I was out there in 1901, I understood that there was considerable development work done on the Old Boot mine up to the time it shut down in 1902.

From that point of the Old Boot Mr. Curtis pointed out the country and he said, for instance, on that side was the mine which belonged to the Silver Bell, and he pointed out the different locations, but I looked upon all these things outside of the Old Boot as prospects, and I never paid much attention even when the English mines were mentioned to me; Mr. Steinfeld wrote to me that he would be willing to pay \$5,000 for the English mines, but I never paid much attention to it; I didn't put much stress on it; I didn't think any mine was worth anything except the Old Boot; the other properties were to me insignificant prospects.

I had some interest in mines that were producing, but I sold the mines to the Copper Queen Company. I did not realize after that sale that if I had acquired all the surrounding ground before selling that property I might have become a very rich millionaire. The properties in which I was interested were all by themselves. The adjoining properties were owned—I could have bought the Copper Queen for \$7,000. I heard of all these adjoining properties being
sold to the Copper Queen for a large price.

228 Q. Didn't that make you realize that if you had a property it was a good idea to acquire the adjoining claims?

A. I always looked upon mining investments as gambling. As a conservative merchant, I looked upon these things as going into a roulette table and putting in your money.

Q. You were opposed to a business firm doing that?

A. As a general rule not to go into mining at all.

Q. What was the reason the change was made in your agreement in August 1899?

A. Well, I didn't like that proposition.

Q. That was the reason of your agreeing to it?

A. Yes; that was my reason. I don't know what reason Mr. Steinfeld had for it.

Q. Wasn't your reason for agreeing to it that you didn't want the firm to deal in mines or purchase mines or go into the mining business?

A. I told you that agreement was not originated out of my brain.

Q. Wasn't that your reason for agreeing to it?

229 A. It was satisfactory to me.

I also owned the Ray mines and sold them in conjunction with Mr. Steinfeld prior to 1899. We bought some surrounding claims for the purpose of increasing the value of the claims we owned for a selling proposition, all prior to 1899.

Q. Now, then, when you got out on the mine, you didn't think to ask whether anybody owned these surrounding claims, surrounding the Old Boot?

A. Well, we did have some conversation, and probably Mr. Curtis and Mr. Curtis showed me the whole country and mentioned some showed me. We were standing on the hill at quite an elevation mines—probably mines which were not owned by the Silver Bell Company.

Q. You didn't answer my question. Didn't it occur to you to ask Mr. Curtis whether anybody owned the surrounding claims or not?

A. It might have been. I do not say whether he did or not.

Q. In 1903 after the sale of these mines between May 20, 1903, and the time you went to San Francisco, do you remember Albert Steinfeld showing you a letter from Mr. Gage, inclosing a letter to
230 him from Percy Williams, stating that a man by the name of Smith was encroaching upon the Imperial mining claim and claiming some interest in it?

A. Well, I remember that Mr. Steinfeld showed me a letter and I am under the impression that it was from Mr. Gage, or one of the officers of the Imperial Company; my impression is that a certain man by the name of Miltenberg was doing some assessment work on some mines which are claimed by the Silver Bell Company, and the gentleman who addressed Mr. Steinfeld, I do not want to say positive that it was Mr. Gage, informed Mr. Steinfeld that they ought to be straightened out.

Q. Do you remember that he said; that is one of the mines you warranted?

A. He said that Miltenberg was doing some assessment work; and I asked Mr. Steinfeld if he looked upon that seriously, and he said, I will settle with that drunken baker; or something like that. Well, I think it was one of the mines belonging to the Silver Bell Company; I cannot tell because Mr. Steinfeld did not guarantee all of the properties.

Q. In the conversation you had with Mr. Steinfeld about that matter over that letter from the officer of the Imperial Copper Company, didn't Mr. Steinfeld tell you that that was one of the claims that he warranted the title to?

231 A. He did not.

Q. Didn't you then say to him, is this one of the Old Boot claims, or the Silver Bell Copper Company claims, or is it one of the English claims?

A. There was hardly any conversation connected with it. Mr. Steinfeld showed me the letter and kind of laughed at it, and he said, it isn't very serious; he said, Old Miltenburg is drunk; I will fix

him all right. I didn't look upon it very seriously, and neither did he. He said it didn't amount to anything.

When I had a conversation with Mr. Steinfeld about that as I have stated before, Mr. Steinfeld had received a very large amount of money and I had made a proposition to him before that time, that any amount of money that he was willing to take out of the proceeds of the Silver Bell I was willing to do the same thing. We owed a great deal of money in New York and I proposed that it was easy to take out \$50,000 of the proceeds of the Silver Bell and pay our debts owed in New York. Mr. Steinfeld said he had to see about that; he said that it could not be done in that way, but I believe the company can loan the money to L. Zeckendorf & Co.; I don't think it can be done in that way, he said. I told him, I said, I want—that was probably a month before one of the notes

232 became due; there was one note to become due on November 20, and the next note came due three months later. There were three notes left. I told him; Mr. Steinfeld, look here, I have got just as much interest in this mine as you have, and I said: Certainly; you shall have every cent that is coming to you. I told him, you have received considerable money already on account of this, and I want you to provide for me in this way. I said: the next payment which is in November, I want you to provide that I get \$50,000 on account. That was in November. And the February note and the May note, I would like for you to get me an order against the Bank of California to pay me \$25,000 on each of these notes. I want to get on account \$100,000 and then he told me he could not do that without consulting his lawyer. And after awhile I saw Steinfeld again, and I said: Can you tell me about that? And he said: My lawyer is out of town and won't be back before three days; and I kept urging him all the time to see the minute book. I arrived here in the latter part of October or the latter part of November; well Mr. Heney had that minute book yet. I guess he kept it as a Mascot.

Q. This talk that you have just been telling was prior to the talk about Miltenberg?

A. No, well I think Miltenberg was before that.

233 I never had any talk at all with Mr. Steinfeld about the division of the money before the Miltenberg talk.

Q. Didn't Mr. Steinfeld tell you in this conversation that you are referring to, that he had warranted the title to these mines and for that reason he didn't want the money distributed until he got a guarantee from you?

A. I said as far as I am concerned I am willing to indemnify you as far as my interest in the mine is concerned.

At the time of the Miltenberg talk I knew that Mr. Steinfeld had warranted the title to some of these mines personally only through him.

Q. In the conversation about Miltenberg, didn't Mr. Steinfeld say to you; this is one of the mines to which I warranted the title?

A. I don't remember anything of the kind.

Q. Didn't you say to him, is this one of the English mines you bought, or it is one of the Silver Bell mines?

A. That word "English" I never used that.

Q. Didn't you say to him, if that belongs to the English group of mines, I don't care; I have nothing to do with it; I don't
234 care anything about it?

A. Do you mean to tell me that? No, I told you.

As I have said before, when we talked about the Silver Bell, I only thought of the Old Boot; the other mines I didn't think anything of; I looked upon them as mere prospects.

Before I went to San Francisco, after the sale of these mines, the time I went up there and had these talks, Mr. Steinfeld had not claimed to me that he owned the 300 shares of Nielsen stock.

Q. Then what was the trap that you were expecting to catch him in?

A. Well, I don't know what Barnes meant by that; I wanted him to admit that that stock belonged to the company.

Q. You say that he had not been claiming that it belonged to him individually?

A. No.

Q. It was to your greater benefit if they belonged to the partnership?

A. I never claimed it.

235 Q. You would have got more out of it if they belonged to the partnership than if they belonged to the company?

A. It was a greater question whether I would get anything at all.

Q. You thought so at the time, did you?

A. Yes, sir; of course I considered 50 per cent a higher percentage than 43.

Q. Mr. Lilienthal thought it was a very bright thing on Mr. Barnes' part to claim it belonged to the partnership, because by setting a trap of that kind you could catch Mr. Steinfeld?

A. Yes, sir; and he walked right into it.

Q. And Mr. Steinfeld asked you to write in the stock book that they did belong to the company, so it would not be forgotten?

A. Yes, sir; that's right.

Mr. MESERVE: This is an amendment to the complaint. I might just as well offer it now. There were some inconsistencies in paragraph three that was added.

236 Mr. IVES: We do not object to the amendment, but we want the complaint as an entirety, all in writing.

Mr. MESERVE: You can see that in this amendment to that paragraph there is a typographical—typographical error which I wish to correct.

Mr. IVES: Go ahead, just write it into the original.

Mr. MESERVE: Now, then, we will ask that the whole of paragraph four as it stands in the original be stricken out and in lieu thereof this paragraph inserted, a new paragraph four substituted in lieu thereof by pasting it on the original. Any objections to that?

Mr. IVES: None at all.

Mr. MESERVE: Now in the original complaint I notice there was no straight allegation that the money was not paid back; I don't think that is necessary in a stockholders' action although I noticed in a case I read recently that the same allegations of nonpayment ought to be made; and I ask permission to add another paragraph to the original complaint, paragraph eleven; that no part of 237 said money was paid back by Albert Steinfeld, and retained by him; and no part of the said notes and no part of the said dividend paid to Albert Steinfeld and to Curtis and to Shelton has been paid back, and the whole thereof remains unpaid.

Mr. HENEY: Go ahead.

Mr. IVES: Are those all the amendments?

Mr. MESERVE: Those are all the amendments.

Mr. IVES: As I understand it, the original complaint as on file, was first amended by paragraph three being presented in place of the paragraph of the original complaint?

Mr. MESERVE: Yes, that is correct.

Mr. IVES: The next amendment was some writing put in one part of the complaint by Mr. Meserve to cover an omission, certain 238 words inserted in some portion of the complaint, made necessary at the time of reading of the complaint by Mr. Meserve at the opening of the case.

Mr. MESERVE: Yes, I think the Court wrote it in; it was written in at the time, either by the Court or the clerk.

Mr. IVES: It was on page 17 of the complaint "again put under the control of said defendant director."

The third amendment is the striking out of paragraph four as it appears in the original complaint and the insertion in place thereof of paragraph four now submitted by Mr. Meserve.

And the fourth amendment is the addition of the words "except as herein stated" in the paragraph three which was submitted as the second amendment, the words occurring on page six, and are interpolated in ink as follows: "Except as herein stated."

And the fifth amendment is the addition to the complaint of a new paragraph, eleven.

Mr. MESERVE: Yes, and we will ask that paragraph eleven be attached to the complaint. Is there any objection to that?

239 Mr. IVES: No, is that on file.

Mr. MESERVE: The clerk will attach the paragraph 11, the new paragraph.

Mr. IVES: All right.

Mr. MESERVE: I will ask you to read paragraph eleven and see if you will admit that none of that money has ever been paid back?

Mr. IVES: I don't like the language of it. You say: Never been paid back, and the whole remains unpaid; the admission might admit we owed it.

Mr. IVES: We will admit that Albert Steinfeld has retained for his own use all of the money testified to have been paid to him out of the proceeds of this purchase price, since the 15th day of January, 1904.

240 Mr. MESERVE: And of the proceeds of the sale of the notes which he made?

Mr. IVES: And has also retained all of the proceeds of the note delivered to him on or after the 16th day of January, 1904.

Mr. MESERVE: And has also retained the \$111 per share on the 300 shares of stock of Albert Steinfeld, trustee, and that each of the defendants have retained the \$111 per share alleged in the complaint to have been paid to them.

Mr. IVES: That is right.

E. S. Ives.

E. S. IVES takes the stand as a witness.

Examination by Mr. MESERVE:

I prepared the resolutions on pages 71, 72, 73, 74, 75, 76 and 77 of the minute book. I prepared the resolutions of the meeting of December 26th, after the organization of the board and before the meeting adjourned. I prepared the resolutions and the

241 minutes appearing in the minute book on pages 82, 83, 84 and 85 of the minute book; minutes dated January 16, 1904;

The resolutions were prepared before the meeting. The minutes I think afterwards, though I am not sure. I prepared the resolutions commencing at the bottom of page 87; well all the resolutions appearing under date of January 20, 1904. I prepared the resolutions before the meeting. I prepared the loose sheet appearing in the minute book under date of January 21, 1904. I think it was probably prepared before the meeting. It is a loose sheet. It was neglected to be pasted in. I prepared the minutes appearing on page 81 of the minute book, apparently a stockholders' meeting and the adjournment. I prepared the special meeting of the Silver Bell Copper Company appearing on page 80 and at the time I prepared the minutes and resolutions to which I have testified, I was acting as attorney for the Silver Bell Copper Company, for the purpose of getting those notes and money back from the Bank of California.

I was requested by the board of directors to prepare the resolutions to that effect, before they were prepared—not as a board, but by the directors individually, probably; I prepared them and the board met and I presented them to the board for action and they passed them.

242 I don't remember whether there was discussion at the time they were passed or not; but there was considerable discussion prior to their preparation.

Jesse W. Lilienthal.

Deposition of Jesse W. Lilienthal, a Witness on Behalf of Plaintiff.

My name is Jesse W. Lilienthal, my age is 49; my residence is San Francisco, California, and my occupation is that of lawyer.

I know Louis Zeckendorf, Albert Steinfeld and Eugene Ives.

Said Zeckendorf, Steinfeld and Ives did meet with me No. 202 Sansome Street, San Francisco, in the first week of December, 1903, and conversed with me about all of the matters referred to in the interrogatories. I cannot fix the date closer than that it was between the first and the fifth of December, 1903. No one was present except those three gentleman and myself. An action had been begun by Mr. Zeckendorf against Mr. Steinfeld and further proceedings were threatened, and an attempt was made at this interview to compromise the differences between these two gentlemen.

One of the points discussed was the status of the 300 shares of
243 stock of the Silver Bell Copper Company as to which Mr.

Zeckendorf claimed that they had been bought for the firm of L. Zeckendorf & Co., while Mr. Steinfeld contended that they had been bought for the Silver Bell Copper Company. Mr. Zeckendorf finally agreed to concede this and then calculations were made as to the proportions in which the various stockholders were interested in the proceeds of the sale of the Silver Bell Copper Company's properties to the Imperial Copper Company which had realized \$515,000 of which \$115,000 had been paid in cash and the balance in four promissory notes of \$100,000 each bearing interest at six per cent. It was admitted that Mr. Steinfeld had 250 shares of the Silver Bell Copper Company; Mr. Zeckendorf 250; Mr. Curtis 170; and Julia Zeckendorf 30. I figured that Mr. Zeckendorf was entitled to 25-70; Mr. Steinfeld figured it 357- 1-7-1000. We finally agreed that the result was the same.

Further matters in controversy were discussed with a view to a compromise; and it was then agreed that out of the funds on hand \$12,500 should be paid on the Volkert-Francis contract, and \$10,000 should be paid to the Nielsen estate; that \$1,500 should be reserved to apply on the F. J. Heney contract, and the sum of \$150,000 should be reserved to protect Steinfeld on the garnishment on an action brought in Arizona by one Franklin against the Silver Bell

Company and liabilities of the Silver Bell Company or of
244 said Steinfeld assumed on behalf of the company.

It was further agreed that a meeting of the board of the Silver Bell Company should be called, at which Mr. Shelton, one of the directors should resign and Zeckendorf elected to fill the vacancy and that at said meeting a dividend should be declared payable immediately of \$87,000. It was further agreed that Steinfeld should deposit \$50,000 in banks to be approved by him and Zeckendorf; said deposit to be in the name of Steinfeld as treasurer of the Silver Bell Company but to be surety to him for any liability arising out of said garnishment or other obligations assumed by Steinfeld for the Silver Bell Company. Mr. Steinfeld agreed to furnish a bond of indemnity approved by Mr. Zeckendorf for the observance of the agreement. Mr. Zeckendorf further agreed to hold said Steinfeld harmless to the extent of 25-70 from any liabilities that might be established against Silver Bell Company or said Steinfeld by virtue of his guarantees and including any claim that he might establish on his claim for compensation for services, unless, as to the latter it was determined that Mr. Zeckendorf by

virtue of the articles of copartnership of L. Zeckendorf & Co. was entitled to share in said compensation; it was also agreed that no action pending or brought to enforce any claim against the company or Steinfeld should be compromised without the consent of Zeckendorf. Also, that when the unpaid notes of the Imperial

245 Copper Company were collected respectively dividends of the full amounts of the proceeds should be declared by the Silver Bell Company. It was also agreed that when everything had been done except the payment of the dividends last mentioned Zeckendorf should dismiss the action brought by him against Steinfeld. In the meantime said unpaid notes were to remain in the hands of the Bank of California for collection, the proceeds to be distributed by means of said dividends. The right was to be reserved to either of the parties to present claims for traveling or other expenses incurred in coming to San Francisco in connection with the negotiation. I therefore prepared a draft of an agreement along these lines, but Mr. Steinfeld stated that he had changed his mind and would not sign the same.

At said meeting I acted as the legal advisor of Mr. Zeckendorf and Mr. Ives acted as the legal advisor of Mr. Steinfeld.

As I already said, Mr. Steinfeld stated that the 300 shares bought from the Nielsens belonged to the Silver Bell Copper Company.

Mr. Steinfeld distinctly stated that said 300 shares were bought by him for the Silver Bell Company, and he made such statement in connection with the denial of the claim of Mr. Zeckendorf that the same belonged to the firm of L. Zeckendorf & Co.

246 I cannot remember anything further than as already testified. Mr. Steinfeld claimed the right to retain all proceeds of the sale made to the Imperial Copper Company, to protect him against contingent liabilities assumed by him on behalf of the Silver Bell Company.

Answers to Cross-interrogatories.

A suit had been commenced by Zeckendorf against Steinfeld previous to any conversations had by me with Mr. Steinfeld in which suit I was the attorney for the plaintiff, but I am not sure that such suit was brought prior to any conversation had by me with Mr. Ives.

I attach copy of complaint in suit commenced by me and affidavit as requested, and would say that I did have the authority from Mr. Zeckendorf in question.

I did state to said Steinfeld and Ives that the attachment suit might have been misconceived and that the remedy to get the proceeds of the sale of the Silver Bell property now seemed to be in the Silver Bell Company and that if the company would not take action for the protection of its stockholders a suit would have to be brought by one of the stockholders for its benefit and that if necessary I would advise Mr. Zeckendorf as such stockholder to bring such suit if the matters were not adjusted.

247 Int. State whether thereafter you brought any such stockholders' suit, and if so, attach to this deposition a copy of the

complaint and of any affidavits made by yourself or Zeckendorf in such suit; and state whether you were authorized by Zeckendorf to bring such suit and make and file any affidavit.

A. I attach copy as requested and had Mr. Zeckendorf's authority for the bringing of the suit.

Plaintiff rests.

Mr. IVES: First we will read the deposition of William Zeckendorf which was taken by the plaintiff and not introduced.

Deposition of William Zeckendorf read in evidence.

Deposition of William Zeckendorf, a Witness on Behalf of the Plaintiff.

My name is William Zeckendorf; I am 63 years of age; I reside in the city of New York. I am acquainted with Louis Zeck-
248 endorf. I am his brother. I am acquainted with Albert Steinfeld. I am his uncle. I know Julia M. Zeckendorf; she is my wife; I have know- of the Nielsen Mining and Smelting Company, now known as the Silver Bell Copper Company. I think since the year 1899. My wife, Julia M. Zeckendorf, was the owner of 30 shares of the Neilsen Mining and Smelting Company's stock. I believe they stood in the name of Mrs. Julia W. Zeckendorf. These shares were disposed of -- me under a power of attorney from my wife, I think on June 18, 1904. The price \$12,479.10 was arrived at upon certain memorandum of account of purchase price from Silver Bell Copper Company sales. I represented Mrs. Zeckendorf and Albert Steinfeld was the purchaser. He represented himself in said negotiations, which I had directly with him in Tucson, Arizona, and receipt was given by L. Zeckendorf and Company on June 23rd, 1899. It was handed to me personally by Albert Steinfeld. I have that receipt; I will not attach that receipt to this exhibit. A copy of the receipt is hereto annexed and marked "Exhibit L," duly marked and identified by the Notary before whom this deposition is sworn and compared by said notary with the original and found by him to be a correct copy.

I am familiar with the handwriting of Albert Steinfeld. I have
249 known it for forty years, during which time I have carried on correspondence with Mr. Steinfeld and during which time Mr. Steinfeld has been both in my employ and a partner of mine. I know the handwriting of the body and of the signature of the receipt; the handwriting of the body is my own; the signature of L. Zeckendorf and Company is in the handwriting of Albert Steinfeld. A memorandum was left with me for Mrs. Zeckendorf referring to the price and how it was arrived at for the thirty shares of stock of the Nielsen Mining and Smelting Company on the 18th day of June 1903, at Tucson, Arizona, while I was in Tucson; the statement was accompanied by a letter signed by Albert Steinfeld. I have that letter. I decline to attach the original for the reason that it is of importance to my wife to retain the same on account of certain conditions still to be fulfilled. A copy thereof is hereto an-

nexed and marked "Exhibit 2," and the same has been compared by the notary before whom the deposition is being taken with the original and found to be a true copy. I have a statement of account which accompanied that letter; for the reason stated above I refuse to attach the original. A copy of said memorandum statement is hereto annexed and marked "Exhibit 3" and has been compared with the original before the notary before whom this deposition was taken, and found by him to be a true copy thereof.

I think there was a document executed by me to Albert Steinfeld at the time. I have not that document. I have a paper 250 which I believe is a copy thereof. I believe the original receipt was typewritten. The copy I now have is typewritten. For the reason given above I refuse to attach the original. Annexed hereto and marked "Exhibit 4" is a copy of said copy, the said exhibit being compared with the notary before whom this deposition was taken and found by him to be a true copy.

I believe my wife and my brother Louis read the letter written to me by Albert Steinfeld of date June, 1904 and the statement accompanying it. That is the same letter and statement referred to above.

I gave the originals to Louis Zeckendorf to take copies thereof. I did not see the copies which he made, but he read them to me, and they compared with the originals I have. I believe they were made in his handwriting. Louis Zeckendorf held the copies. They were correct the way he read them to me. Louis Zeckendorf also read the memorandum or statement of account which accompanied that letter.

Mr. Steinfeld stated to me that while he had the legal right to pay a smaller amount to me or my wife for the thirty shares, he was willing that my wife should derive all the benefits and profits which he had made individually, or in conjunction with my brother Louis 251 in the transactions of a sale of these mines, and therefore paid my wife more than as he said he was legally bound to pay.

EXHIBIT 1.

Established 1854.

Louis Zeckendorf,
34 to 36 Thomas St., N. Y.

Albert Steinfeld,
Tucson, A. T.

Office of L. Zeckendorf & Co., Tucson, A. T.

TUCSON, A. T., *June 23rd*, 1899.

Received from Mrs. J. W. Zeckendorf, thirty shares of the Nielsen Mining and Smelting Company on deposit and subject to her order.

L. ZECKENDORF & CO.

EXHIBIT 2.

Eugene S. Ives.

Marcus A. Smith.

Smith & Ives, Attorneys.

Tucson and Yuma, Arizona.

Tucson, June 18, 1904.

Wm. Zeckendorf, Esq., Tucson, Arizona.

252 DEAR SIR: I enclose herewith memorandum of the account of the purchase price received from the Silver Bell mines as of December, 1903. The sum of \$51,500 was garnisheed in my hands by Selim M. Franklin, and that sum of money does not appear upon this account. There is also pending against the company a suit brought by Burnett and others. When these suits are determined I will render you a supplemental account of all expenditures from December, 1903, until the determination of said suits; and if after paying the amounts of any judgments that may be recovered in them and all costs and expenditures of every kind there should be a balance, you will be entitled to your proportion thereof as additional consideration for the thirty shares of stock this day sold to me by yourself and wife.

Yours very truly,

ALBERT STEINFELD.

EXHIBIT 3.

Memorandum of Account of Purchase Price from Silver Bell Sales.

JUNE 18, 1904.

Total receipts, cash and notes.....	\$527,421.50
Less garnishee, Franklin suit.....	51,500.00
	<hr/>
	475,921.50
Total disbursements.....	184,739.77
	<hr/>
	\$291,181.73

253 1000 shares \$291.18 per share.
30 shares \$12,479.10.

EXHIBIT 4.

Know all men by these presents, that for and in consideration of One Dollar in hand paid by Albert Steinfeld to each of the undersigned, the receipt whereof is hereby acknowledged, we, the undersigned, do hereby sell and transfer to Albert Steinfeld thirty (30) shares of the stock of the Silver Bell Copper Company, the said stock now standing upon the books of the company in the name of Albert Steinfeld, trustee. The said *book*, by virtue of these presents to be

held by the said Albert Steinfeld, his executors, administrators and assigns for his own use and benefit forever.

It is admitted on the record that H. Y. Harrison if present, would swear that on the 26th of December, 1903, he was over the age of 21 years; that he resided in the City of Tucson on said day; that on the 20th day of December, 1903, he delivered to Louis Zeckendorf at his residence corner of Stone Avenue and Cushing street, in Tucson, the said Louis Zeckendorf being a member of the
254 firm of L. Zeckendorf & Co., and being the plaintiff in a certain suit brought against Albert Steinfeld, the Silver Bell Copper Company and others, in the Superior Court of San Francisco, California, and being numbered in said Court, 88,481, the following:

DECEMBER 20, 1903.

Mr. Louis Zeckendorf, Tucson, Arizona.

DEAR SIR: I hereby demand the immediate dismissal of the injunction suit instituted by you in the Superior Court in San Francisco, State of California, against me, the Bank of California, the Silver Bell Copper Company, J. N. Curtis and R. K. Shelton, and I will comply fully and forthwith with the terms of the contract existing between me and the Silver Bell Copper Company; copy of which was given you on Saturday, December 19, 1903, and bearing date the 20th day of May, 1903.

Very respectfully,

ALBERT STEINFELD.

It is admitted that on the 19th day of December, 1903, Albert Steinfeld caused to be delivered to Louis Zeckendorf, a copy
255 of the agreement in evidence, dated May 20, 1903, which agreement is annexed to the resolution of rescission, and pasted in the minutes as a part of the stockholders' meeting held on the 26th day of December, 1903.

Mr. IVES: We put that affidavit in as an exhibit.

Affidavit marked as defendant's exhibit "P."

Mr. IVES: I offer in evidence the escrow instructions to the Phoenix National Bank signed by the Mammoth Copper Company, Albert Steinfeld, the Imperial Copper Company and by the Silver Bell Copper Company, bearing date the 20th day of May, 1903, which said escrow instructions refer to five certain documents therein named; it being plaintiffs' exhibit No. 25 in the suit of S. M. Franklin vs. the Silver Bell Copper Company and defendants' exhibit "Q" in this suit.

Mr. IVES: I offer in evidence a deed dated the 20th day of May, 1903, executed by the Mammoth Copper Company, the Silver Bell Copper Company and Albert Steinfeld, which was one of the papers referred to in said escrow instructions; also deed executed on the
256 20th day of May, 1903, by the Mammoth Copper Company, the Silver Bell Copper Company and Albert Steinfeld, which is another of the deeds mentioned in said escrow instructions.

3rd. A bill of sale executed by Albert Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company, being another of the papers mentioned in said escrow instructions.

4th. A quit claim deed executed by Bettina B. Steinfeld to the Imperial Copper Company which is another of said papers mentioned in said instructions.

And last, a deed executed by J. N. Curtis to the Imperial Copper Company, which is another of the papers mentioned in said escrow instructions. Said papers having been executed on the 20th day of May, 1903, and the Imperial Copper Company being the grantee or vendee, in all of such papers, and all bound together at one exhibit being exhibits 20, 21, 22, 23 and 24 in the Franklin suit, and all being marked as one paper exhibit (defendants) "R" in this suit.

Mr. IVES: I offer in evidence a copy of the order of injunction granted by the Judge of the Superior Court of San Francisco, State of California, in the action brought by Louis Zeckendorf on the 8th day of December, 1903, against Albert Steinfeld, the Bank of California, the Silver Bell Copper Company, J. N. Curtis and R. K.

Shelton, restraining Albert Steinfeld from withdrawing or
257 receiving from the Bank of California, and restraining the bank from delivering or paying to Steinfeld any of the money or notes in the custody of the bank.

By the COURT: It may be admitted.

Mr. IVES: I don't remember whether the plaintiff put in evidence the agreement between the Mammoth Copper Company, the Silver Bell Copper Company and Albert Steinfeld, executed on the 20th day of May, 1903. I offer that in evidence. It is the agreement in which they agreed to sell all these properties to the Imperial Copper Company, and to place the papers in escrow, dated May 20, 1903; the escrow instructions were a fulfillment of that agreement.

Admitted and marked defendants' exhibit "V."

Mr. IVES: And I wish to call the Court's attention to one provision in it. The parties of the second part, that is the Imperial Copper Company at its own cost and expense, agrees to do the annual assessment work for the year 1903 on all of the mining
claims.

258 Mr. IVES: Now, I offer in evidence a deed executed on the 21st of August, 1900, between Frederick Clark Beckwith of London, England, the Tucson Smelting Company, Limited, of Tucson, Arizona, and Albert Steinfeld of the City of Tucson, parties of the second part. That last acknowledgment of Mr. Tenney; the other two acknowledgments appear to have been made on the 21st of August, 1900; and this is a deed of eleven mining claims, which are referred to as the Steinfeld group of mines; being plaintiff's exhibit No. 7 in the Franklin suit.

Mr. MESERVE: Objection.

Objection overruled.

Now, we offer in evidence from the minute book of the Mammoth Copper Company:

It is admitted on the record that the book in hand is the regular minute book of the Mammoth Copper Company, and I offer in

evidence the entire book, all of the minutes, pages 4 to 35, and also a loose sheet in typewriting, with the initials E. S. I. in lead pencil.

By the COURT: It may be admitted.

259 Reads from the minute book of the Silver Bell Copper Company, page 27, the seventh meeting of the board of directors.

Also the minutes of July 15, 1901.

E. S. Ives.

E. S. IVES called as a witness on behalf of the defendants testified as follows:

Direct examination.

By MR. HENEY:

I accompanied Mr. Steinfeld to San Francisco from Tucson in December, 1903.

I left here in November, 1903, and reached San Francisco I think in November, 1903, I know I did, on the 30th of November. I accompanied him to the bank of California the first day I arrived there, either the 29th or 30th of November. Mr. Steinfeld and myself together made a demand on the Bank in regard to the notes Mr. Steinfeld had on deposit there and cash. The Bank said they would consult their attorney and let us know the next day. We went back there the next day sometime in the afternoon. They replied that they understood that Mr. Zeckendorf had left Tucson and was coming up there, that Mr. Steinfeld and Mr. Zeckendorf had been
260 partners and both doing business with them for a great many years and they preferred not to give us a reply until he should get there the following day. We went back the following day. As we went in we met Mr. Zeckendorf and Mr. Nuttall, I understand now that is his name, coming out of the bank, about half past nine. We did not stop to talk with Mr. Zeckendorf. We went in and asked them if they had arrived at a determination in respect to the demand which he had made upon them. They said they would let us know about noon definitely.

We demanded the notes and the money, and said that Mr. Steinfeld had deposited them there personally, and we didn't think the bank had any right, unless they were legally prevented from so doing, withholding from Mr. Steinfeld, property which he himself had placed there, merely at the instance of some third party who forbade them from so doing; and we expressed ourselves as very indignant at the stand the bank was appeared to be taking. They said they would let us know about noon definitely, and while we were there a telephone message arrived—I didn't hear the telephone—but Mr. Anderson, I think the vice-president of the bank or manager of the bank or perhaps the cashier, Mr. Moulton, one of them stated that
261 Mr. Zeckendorf or some one representing him; that Mr. Zeckendorf had telephoned he would meet us there about noon, and asked us to be there at that time, and we said we would, and left.

We went back there at noon. As we went into the bank Mr. Steinfeld was served with a copy of a summons and complaint in an attachment suit, an action for debt, the complaint in which is in evidence in this case. That is the one in which the attachment was issued, a suit for some \$52,000.

We found Mr. Zeckendorf and Lilienthal, his attorney, Mr. Anderson, Mr. Moulton, the cashier and Judge Allen the attorney for the bank. We then proceeded into the directors' room, all of us, at the invitation of Mr. Anderson.

Well, I think I opened it up by telling Mr. Anderson that he had promised to give us an answer at noon as to whether he would deliver to us the notes and the money, which Mr. Steinfeld had deposited with them, and I wanted an answer; and Mr. Anderson stated that the bank was unable to give us the money or the notes because they had been served with a writ of attachment or garnishment. I forget which; and I thereupon said, well, Mr. Anderson, you need not worry about that; I want an answer in behalf of Mr. Steinfeld, I, representing Mr. Steinfeld, I want an answer; if you will give us the notes and the money and only withhold them by reason of

the attachment, we can dispose of the attachment in a very
262 short time; I want to know now if you will deliver us the notes the money; and he then said he would consult Judge

Allen and let us know about it. I told him that we would not wait—Judge Allen was there—we had been there two or three days and they promised us an answer at noon; It looked to us as if they knew that Mr. Zeckendorf was going to bring this suit and had held Mr. Steinfeld off in order to give Mr. Zeckendorf time to bring suit; and we said we would not stand any more nonsense from them and we wanted to know definitely what they would do and we would dispose of the attachment; and Mr. Anderson and Judge Allen were evasive, they didn't answer (strike out the word evasive); Mr. Lilienthal then came to their rescue and he said, well, Mr. Ives, we will relieve our friends; the bank here of answering any embarrassing question; and I will tell you now that I have dictated the papers in a stockholders' proceeding, which Mr. Zeckendorf, as a stockholder of the Silver Bell Copper Company, will bring and in which we will ask and in my opinion obtain, an injunction restraining the bank from delivering these notes and this money to Mr. Steinfeld, and, therefore, if you get your attachment released, I will have my injunction before you can get your bond and get it released, and it won't do you any good to have it done, and our friends, the bank,

will be relieved from any responsibility of determining what
263 they would do in the premises. I can't give the exact language, of course, Mr. Heney; but that is the precise purport of it, the substance.

Then Mr. Anderson suggested that Mr. Steinfeld and Mr. Zeckendorf talk the matters over and see if they could not come to some arrangement with each other. The action of the bank was pacific from the outset, except they would not give us the notes and the money. Mr. Lilienthal then said that the minute book had been withheld from Mr. Zeckendorf, and I explained that Mr. Steinfeld hadn't had it in Tucson; that I understood from him that it had been

in the hands of Mr. Heney in San Francisco and in Washington. Mr. Zeckendorf expressed some incredulity; and Mr. Lilienthal said it was the duty of Mr. Steinfeld to keep the book where it could be inspected at all times; and I told him I didn't think it was the duty; that under the Arizona statute Judge Davis had decided that a stockholder was not, without legal proceeding, entitled to an inspection of the minute book, under our statute, and we had some discussion on that.

We were a little angry and then Judge Allen asked me.

Q. Had you seen the minute book at that time?

A. I had never seen it.

Q. Did you know there was a by-law that authorized stockholders to see it?

264 A. I did not; I never had seen it. And then Judge Allen asked us if we persisted in not showing the book to Mr. Zeckendorf, and I told him I did not; that I had never seen the book. I was asserting a right when they criticised us that the minute book had not been held in Tucson subject to inspection of Mr. Zeckendorf; and I told Mr. Lilienthal and Mr. Zeckendorf that I had no doubt we would deliver them the minute book within a short time, and we thereupon left with the understanding that after lunch I should let Mr. Lilienthal have the book. I then proceeded with Mr. Steinfeld to the office of Mr. Heney where we found the book, and I read it, and after lunch, sometime between two and three o'clock, I handed it to a clerk in Mr. Lilienthal's office, Mr. Lilienthal being absent, not having returned from his lunch, and took a receipt for the book, that it should be returned to Mr. Steinfeld or myself upon demand. The book stayed in Mr. Lilienthal's office for two or three days.

We then met the next morning. We left the minute book with Mr. Lilienthal until the next morning, and Mr. Steinfeld and myself met Mr. Zeckendorf and Mr. Lilienthal in Mr. Lilienthal's office. We discussed the controversy. Mr. Zeckendorf wanted an immediate

265 distribution of the funds, and he wanted the money and notes withdrawn from Mr. Steinfeld's personal control and placed in some bank to the credit of the Silver Bell Copper Company.

I thereupon stated on behalf of Mr. Steinfeld that under the agreement which Mr. Steinfeld had with the company, Mr. Steinfeld was entitled to the custody of the notes and of the money until he should be discharged from certain guarantees he had made and we examined the minute book, the agreement dated May 20; we didn't have it with us in San Francisco, but we examined the minute book and it appeared that parts reciting the substance of that agreement had lines drawn through them on the minute book, and we didn't have it. That agreement, Mr. Steinfeld stated to the best of his recollection, provided that he should have the custody of the notes and money, and should have the right to prevent any distribution of the proceeds until he should be discharged from his guaranty. Mr. Lilienthal suggested that Mr. Zeckendorf would give a bond to indemnify Mr. Steinfeld and Mr. Steinfeld said that would be satisfactory to him, and this lasted a day or two, I don't remember, maybe three or four days; I don't remember exactly how long; but Mr.

Zeckendorf or Mr. Lilienthal finally made a proposition that Mr. Zeckendorf should be elected as director of the Silver Bell Copper Company, and Mr. Steinfeld assented to it, and finally we had substantially come to an arrangement one morning—

266 Q. Before you come to that. Was there anything said about the terms of the option of July 15th, 1901, referred to, which appears in the minutes, as to the \$18,000?

A. I stated to Mr. Lilienthal, during the course of these conversations, when he talked about this injunction suit which he threatened to bring—and I anticipated myself here a little. Then we left the bank with the intention of conferring to see if this difficulty could be avoided. Mr. Lilienthal said if we would agree not to get a bond and release the attachment, he would agree not to file his complaint in the stockholder's suit and get an injunction; but we would wait until our negotiations either resulted in an agreement or disagreement. In the course of our negotiations, Mr. Lilienthal at times alluded to this injunction suit, the papers of which had been prepared by him, and I told him then we would agree that Mr. Steinfeld had told me—

Q. Was this in the presence of Mr. Zeckendorf?

A. Yes, I think it was, all in the presence of Mr. Zeckendorf. I might possibly be in error about that, because at times I would go out with Mr. Steinfeld and leave Mr. Zeckendorf in Mr. Lilienthal's private office; and he furnished Mr. Steinfeld and myself with a private office where we withdrew to confer. It may be that I had

267 some talk in which Mr. Zeckendorf was not present; but I think he was present at all of them. But in any event, I told

Mr. Lilienthal that Mr. Steinfeld told me that the Silver Bell group of mines which he had purchased and paid his own money for, were worth more than the original properties of the Nielsen Mining and Smelting Company, and that if he brought an injunction suit, as a stockholder, he would in order to withhold from us the custody of those notes, he would have to ask that this agreement giving us the custody be rescinded and that if he did, the proposition of July 15, 1901, having elapsed, Mr. Steinfeld would get back and be entitled to his proportionate share of those proceeds, and I thought that Mr. Zeckendorf might suffer a loss, a considerable loss, and Mr. Lilienthal laughed at me, at my view of the legal status.

Q. You finally reached a conclusion?

A. We finally reached a conclusion, Mr. Steinfeld all through insisting that he felt very much injured and outraged at the newspaper reports, the attachment suit, and of the injury he thought, to his standing, integrity and credit, particularly to his standing and integrity; and he insisted as a condition precedent that Mr. Zeckendorf should state to the Bank of California that Mr. Steinfeld had had an absolute right to the custody of those notes and that money. I remember Mr. Zeckendorf stating that he did not

268 like to admit, or go to the bank and say he had advised them that Mr. Steinfeld didn't have a right to them, when, as a matter of fact Mr. Steinfeld had the right and I suggested to Mr.

Lilienthal or Mr. Zeckendorf that they could go to the bank together and make that statement without in any way impairing his own dignity, because he could say that he never saw the agreement of May, 1903, giving Mr. Steinfeld the right to the possession of these notes and proceeds, and having seen the minute book he could go to the bank and say that he was mistaken, and say that Mr. Steinfeld had the right to them. And finally it was agreed that Mr. Zeckendorf should do that, and that he should be elected a director in the Silver Bell Copper Company, and Mr. Zeckendorf should give Mr. Steinfeld an indemnifying bond for the guaranty, and the distribution should take place immediately and the suits should be dismissed at once. No, the injunction suit had not been brought. The attachment suit should be dismissed.

Q. Now then, after having reached that conclusion, did either side prepare a proposition covering it?

A. Yes, that was in the morning around 11 or 12 o'clock. Mr. Lilienthal said if we would meet him at his office in the afternoon, he would in the meantime have prepared a paper setting forth the terms of this arrangement that had been arrived at; and Mr. Steinfeld and myself left and came back to Mr. Lilienthal's office
269 in the afternoon, and he had such a paper in typewriting in duplicate and he gave me one of them and I have it in my hand.

Mr. HENEY: We will offer that as a part of the examination. Just read it.

(Witness reads the paper.)

Q. Was that agreement read there by you people at the time?

A. That agreement was handed to me and I read it.

Q. Go ahead and tell what happened.

A. When I got to paragraph 9, which says: when all the foregoing things except those mentioned in the last paragraph, which was when the unpaid notes were collected, shall have been done, the action brought in San Francisco shall be dismissed, I stopped and said to Mr. Lilienthal and Mr. Zeckendorf that the express understanding and the chief purpose of Mr. Steinfeld having any negotiations with them was that forthwith the suit should be dismissed and that Mr. Zeckendorf should state to the Bank of California that Mr. Steinfeld had had a legal right to the custody of the notes and money all the time and that we would not come to
any agreement with them unless the suit was dismissed, and

270 that statement made by Mr. Zeckendorf to the bank. Mr. Lilienthal then stated that it was unusual that anything should be dismissed until we had entirely fulfilled the contract; and I said, Mr. Lilienthal, we cannot elect Mr. Zeckendorf a director until we return to Tucson; and Mr. Steinfeld is willing to sign the paper that we will do this. He is even willing to give his check now for the amount of the dividends which would come out of this present distribution to Mr. Zeckendorf, but he will not consent to anything unless today, or before these papers are signed, before we leave San Francisco, Mr. Zeckendorf will dismiss the attachment

suit and will go to the bank and make the statement that Mr. Steinfeld had a right to do it, until after we should have returned to Tucson and complied with the things in entirety, and we thereupon broke up and that ended negotiations.

Mr. Zeckendorf and Mr. Lilienthal claimed that the 300 shares of stock belonged to the firm of L. Zeckendorf and Company, and Mr. Steinfeld claimed that under his proposition to the company, which appeared in the minutes and their adoption, that all of the purchase price belonged to the Silver Bell Company and that those 300 shares of stock by reason of that agreement belonged to the Silver Bell Copper Company and that they never belonged to L.

Zeckendorf and Company and they acceded to our position.

271 Nothing was said at that meeting to the effect that the

300 shares of stock had been bought by Mr. Steinfeld for the company or for Zeckendorf and Company; that they had been bought by him for that.

I heard the testimony of Mr. Zeckendorf on that subject. I heard the testimony of Mr. Zeckendorf in reference to refusing to let him see the minute book after I got back to Tucson. I don't know what explanation, if any, I have to make to that. He had the minute book, or Mr. Lilienthal had it for several days in San Francisco. There was a good deal of feeling at the time. I made no objection in San Francisco to Lilienthal making a copy of it. He had it in his possession for three or four days. I didn't make him promise that he wouldn't copy it. When that resolution was passed, the exact purpose of it, I don't remember; at the time the resolution of December 9th, changing the by-laws, but as a matter of fact, when Judge Barnes first came to me about it, which I think was several days before the minute book was delivered to Mr. Zeckendorf, as I remember; but I know they had it for over a week before this stockholders' meeting at which the resolution was rescinded.

Q. You just had a little fit of temper, I suppose?

A. Well, all of us were a little bit hot.

272 I don't know what was the purpose in passing that resolution confining the right of inspecting the books to the directors, except to make it conform to the Arizona statute as I understood it to be, that a stockholder was not entitled to it. I did not think a director could give a proxy. I have never been of that opinion, but I wanted it to appear that Mr. Curtis had no objection to it, to the change; I don't remember for certain what was done; but they saw the book within a few days after that; and that was the only time I objected to them seeing the book. They have had the books as often as we have. I may state that in San Francisco I stated to Mr. Lilienthal what Mr. Steinfeld understood to be the contents of the agreement of May 29th, and on my return I had a copy of that agreement sent to Mr. Zeckendorf, or Judge Barnes and offered to let them examine the original and compare it with the copy, if they wished. Mr. Lilienthal nor anyone there did not ask me for a copy of the option of July 15th, 1901. The substance of it was spread out on the minutes; but in any event

they never asked me for it; I don't think I had ever seen it. I didn't see it for a long time. I think Franklin produced it; I don't remember when I first saw the proposition. I think I had not seen it at that time. I might be mistaken about that. You understand I had never been Mr. Steinfeld's attorney in any matter until a few

273 days before this, and I was totally unfamiliar with his affairs. When I say before the trial, I mean before the Franklin trial. I mean before the Franklin trial I think I found out that Mr. Heney had that and that he sent it down a long *line* afterwards. I don't remember that I had ever seen it until after this suit was brought. I don't know whether Mr. Heney had ever seen it.

Mr. HENEY: I had Mr. Steinfeld's copy in San Francisco.

Mr. IVES: I don't know. I may have seen it in San Francisco. As I say, I was not familiar with the papers or the issues at that time; it was all new to me.

Cross-examination.

By Mr. MESERVE:

At the time I caused this change to be made in the by-laws of the Silver Bell Copper Company, by having Mr. Donau act as a proxy for Mr. Curtis I knew there was only one other stockholder in the corporation besides the directors, and that was Mr. Zeckendorf. I think the purpose of the resolution was undoubtedly to affect Mr. Zeckendorf. I was not familiar with the penal statute when I passed that resolution.

By the COURT: When was it that the injunction suit was
274 disposed of?

The injunction suit never has been dismissed; the attachment ~~suit~~ was dismissed after this agreement of re-cission, sometime between the 29th of December and the 2nd or 3rd of January.

Mr. Heney introduced the following letters in evidence:

Letter dated October 30, 1899, Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "AA."

Letter dated March 16, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "BB."

Letter dated April 25, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "CC."

Letter dated New York, May 9, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "DD."

Letter dated June 2, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "EE."

Letter dated June 17, 1901, from Louis Zeckendorf to
275 Albert Steinfeld, which is marked Defendants' Exhibit "FF."

Letter dated September 3, 1901, from Louis Zeckendorf to Albert Steinfeld, marked Defendants' Exhibit "GG."

Letter dated December 14, 1901, from Louis Zeckendorf to Albert Steinfeld, marked Defendant's exhibit "HH."

Letter dated May 21, 1903, from Louis Zeckendorf to Albert Steinfeld, marked Defendant's exhibit "II."

Mr. HENEY: We have a statement of account. I will show it to you. You can verify it yourself, if you want to.

J. N. Curtis.

J. N. CURTIS called as a witness on behalf of defendant, testified as follows:

Direct examination by Mr. HENEY:

I am one of the defendants in this action, and was one of the original incorporators of the Nielsen Mining and Smelting Company. Mr. Steinfeld explained to me that Mr. Nielsen had a lease on the Old Boot mine and things were not going satisfactory, and he requested me to go out there and go over everything and report to him what I thought should be done. I went out there and
276 with Nielsen; I went through the property and had quite a talk with him in regard to matters in detail and I returned to Tucson and explained how matters were out there and I advised Mr. Steinfeld to incorporate a company with a small capital so as to furnish Nielsen with some capital to do development work with as he reported to me that he was unable to do any development work and hence could not make any progress. Mr. Steinfeld said for me to go to Mr. Franklin and explain to him everything and finally the corporation was formed. I was to take supervision and management of the whole thing.

The purchase of the mine was first discussed several months after that; I could not say exactly when. I understood at that time that the property belonged to William Zeckendorf, or rather, to Julia Zeckendorf, his wife, and that Mr. Steinfeld was carrying it for them—or rather her, which ever it was, and that Zeckendorf and Company had made a certain arrangement with Mr. Zeckendorf who was out here at the time to buy Julia Zeckendorf out and get the Old Boot for the Silver Bell Copper Company, at the price of \$25,000. I think it was \$25,000 down and I think it was \$25,000 every three months.

Mr. MESERVE: That is correct.

277 Mr. IVES: Do you know the date of the contract?

Mr. MESERVE: I think it was, my impression is, that it was the last part of February or the first part of March of the year the Nielsen Mining and Smelting Company was organized. That would be 1899. It was either in February or March of that same year that the contract was entered into between Albert Steinfeld, trustee—It was in January, 1899, that the corporation was formed. I don't remember the date of that contract. I think both Louis Zeckendorf and William Zeckendorf were out here at the time that the arrangement was made.

Louis Zeckendorf came to me and said that he wanted L. Zeckendorf and Company to have 50 per cent and that Nielsen and myself could divide the other 50 per cent as we wished. That was the conversation at that time.

He said that he didn't care about doing that; that he didn't want

anything to do with the Nielsens and told Mr. Zeckendorf that I didn't want any change in my stock and it was finally settled. I think he gave the reason that L. Zeckendorf and Company had advanced money and that he didn't want to have less than the control of the mines.

278 I remember the occasion of the purchase of the Nielsen—first of the Francis and Volkert titles.

The condition of the Old Boot mine, in a general way, when I went out there after this corporation was organized in 1899 was very bad. There was no ore in sight and the furnaces were shut down and everything was in bad shape. It was down to 150 feet. It was not what I would call a proven mine at that time.

I commenced mining in Montana in 1869 and I stayed in Montana until 1872, and then I came to Pioche, Nevada, and in 1875 I went to Bristol, Nevada. I was mining all the time. I left Nevada in the spring of 1879 and came to Colorado and New Mexico and in the early part of 1880 I came to Arizona and I have been here ever since. I have studied geology and metal-urgy in a practical sense. I had to study all the time. During that time I was studying mines. In Nevada I owned my own mines and I attended to them all the time, and in Montana I had the general supervision of my own mines also. In Arizona ever since I have been here, I have represented L. Zeckendorf and Company in their mining interests. I oftentimes have superintended for them and sometimes there would be other superintendents and I would go out there and stay a day or two and report how things were going and I really had the general management of all their mining interests.

279 I have made a sale of properties that I got a commission on. When I first went out there I took Mr. Hill out there and showed him the Old Boot property. That was in 1898 at the time Nielsens had a lease. The Neilsens at that time were working under a lease and when we came back Mr. Hill reported that the property was too small for him or for his people. There was not enough property there to suit them. When I went out there along in December, 1898, and I looked into the merits of the property to see what should be done with it and I came back from there at that time and I told Mr. Steinfeld about the incorporating of the company, and I also impressed upon him the necessity of getting such adjoining properties as he could into his possession. It was very hard to sell the copper property without the adjoining mines. I was always doing all I possibly could to impress that on Mr. Steinfeld because a company does not want to invest unless they can get all the surrounding property and I told him it was imperative if they contemplated a sale of the Old Boot mine to have it. That no experts or mining engineers would go out there and look it over without turning it down, unless they had all the ground and then they could not sell.

On the Old Boot mine there was a body of ore shown on the property that I knew was a true fissure. The eruptive rocks came right up through the quartzite and the thermal waters had gone

through and left their deposit. There was a large body of
280 manganese in our working shaft, all of which was going to
show the great merit of the property. There is a gulch about
300 feet from the south end line of the Old Boot mine and by going
into that gulch you could see where the back came out and went up
the hill and over to the Prospector. That's on the Old Boot. Near
its south line there so that it was very necessary in my estimation to
get the Prospector mine, which would be very very hard from the
surface to tell where the true fissure occurred, whether in the Old
Boot or in the Prospector. The surface would give you an idea that
it was in the Prospector ground and I explained all that to Mr. Stein-
feld, and I told him that it was going still further north. The fissure,
of course, would be in eruptive rocks and not on the vertical plane.
The true apex is on the Old Boot, but there was just as much chance
on the Prospector. I described already that the apex had split in
two and you would have everything on the Prospector just as much
as on the Old Boot. The Mountain View was an adjoining claim to
the east.

Q. As a matter of fact, is not the true apex on the Old Boot mine?
Or was it found on the Mountain View?

A. Well, I don't know. It is more than likely.

Q. Do you know as to where it is?

281 A. Well of course when we sold it, it was not determined.

It was not determined at that time. I called Mr. Stein-
feld's attention to danger of the fact that it did.

MR. MESERVE:

Q. Did what, apex on the Mountain View?

A. Yes, sir.

That was several times before we sold it. It was while I was
working in the mines between January 1901, and January 1902.

To the north of the Old Boot came the Page and the Union, the
Comet, the Southern Beauty and on that group there were three
distinct fissures, similar to the Old Boot with the exception that on
the Old Boot there was a basalt wall and on the Imperial it is por-
phyry. If anything the Southern Beauty and the Union and the
Comet were larger than the Old Boot. On the Old Boot, as I have
said, the fissures were split in there. The character of the ore in the
outcroppings in the Old Boot was carbonate ore. There was very
little sulphide scattered through it.

The character of the ore of the Imperial and the Union and the
Southern Beauty was identically the same but if anything it was
a little richer than on the Old Boot.

282 Q. Do you know whether or not the ores taken from the
surface of the Old Boot were of more value than that which
came up from below?

A. Well, going from what is left there you could see only the
low values on the Old Boot.

I have assayed the values on the Imperial outcrop. It was on the
outcrop that I really looked after Mr. Steinfeld had bought the
English mines.

I was all over it and I was all over the Imperial and it, I say, was

the last one that showed the eruptive rock. North of that, right on the summit of the hill the ledge was plain and below that it run under there. That was the mistake that the other people made. I went to the Old Boot mine to remain there in charge the first time in July, 1901. In 1899, I was there probably once a month or once in six weeks or two months. I think from December 1899, until the early part of September 1900. The reason for shutting down the mine in December 1899 was that the mine was in a very bad condition. There was no ore in sight and Mr. Steinfeld was having considerable trouble with Mr. Nielsen and he finally decided to shut it down. It was not started up again until September 1900. In the meantime Mr. Steinfeld had bought the Francis and Volkert titles; I think it was in May, 1900, and the Niensens' interest next month, in June 1900.

283 Mr. Steinfeld started for Europe in the latter part of September, 1900; he left Tucson on that European trip in the latter part of August. I saw him in San Francisco about the middle of September. I didn't have anything to do with the negotiations for the purchase of the Nielsen interests. I had nothing to do with the purchase of the Francis and Volkert titles. I knew that Mr. Steinfeld was trying to buy it for a long time before he got it.

I had no conversation with Mr. Steinfeld in regard to having the Nielsen Mining and Smelting Company borrow money for the purpose of buying the Francis and Volkert titles.

Q. Did Mr. Steinfeld ever say anything to you prior to the purchase of the Francis and Volkert titles, or deeding those titles to him as to what he intended to do with them if he bought them?

— Prior to June 20, 1900, while president of this corporation, the Nielsen Mining and Smelting Company I had no talk with Mr. Steinfeld about the corporation borrowing money for the purpose of acquiring the Nielsen stock or any of the claims that the Niensens or Lewis might have had.

I had no talk with them about the Nielsen Company buying stock or the claims. My answer was intended to apply prior to June 29, 1900.

284 I executed that agreement (Defendants' Exhibit 44, agreement June 29, 1900) as President for the company. They were all present when I signed that.

If I remember I think Mr. Steinfeld and myself were both out there at the Silver Bell and we came past the Atlas. The Niensens were living at the Atlas then and Mr. Steinfeld stopped and had a talk with them and it was during that visit that this thing came up about their interest in the stock and the mines.

This agreement covers this stock, but the deed is of the same date. They wanted to make an arrangement with Mr. Steinfeld; they had an option on some mines there and they wanted to carry on their operations there and then Mr. Steinfeld made that agreement with them. I was present when he talked with them. I heard what was said. The sum and substance was that Mr. Steinfeld agreed to buy their stock. He said—he finally agreed that he would give them

\$2,000 in money and a share of the mines. Some of the stock as near as I can remember. He would give them \$2,000 in money and \$10,000 when the property was sold. I mean when the Old Boot property was sold. I had heard that they had been jumping a great many mines around there and some of ours. They were trying to give trouble all around there and when he made that trade, it was understood that they would sell all of their mining
 285 interests, whatever they might be, and when the papers passed, they specified two mines, the Identical mine and the Clarence mine. That was the name of the mine, the Identical was. The Identical mine was located, I found afterwards about a half mile, I should judge from the Old Boot mine and right down in a gulch amongst what we called the Young America group. They had a half interest. This is the deed (Referring to paper).

Mr. HENEY: We offer the deed of the Identical mine from Carl S. Nielsen and Mary Nielsen to Albert Steinfeld. It is dated June 29th, 1900.

Mr. Steinfeld wrote out to me that Lewis who owned the other half, wanted Steinfeld to do the assessment work with him. In other words, he wanted Steinfeld to do the assessment work on his half of it, with Lewis and I wrote back and told Steinfeld that I wouldn't do the assessment work for the mine. I would throw it up and I believe he did throw it up.

The Clarence mine that was claimed by the Niensens was in there amongst the Yankee and the Hamilton and the Page and I think a part of the Comet led up near the corner of it. At the time of this conversation I think I knew when the Niensens and Lewis had located the Clarence mine. The assessment work had been done
 286 to my knowledge on the Clarence mine by the parties in whose names the locations then stood at the time the Niensens and Lewis located it and I told Mr. Steinfeld these facts.

Q. The ground covered by the Clarence claim was one of the claims that the English people claimed the title to. The Clarence was lapping on three or four of the English titles. The Francis and Volkert mines were identical with the English mines. Francis and Volkert had been employed by the English company and they remained there in charge on a salary. While they were there they located the claims. While the English people were in possession of the property I know they had been doing the assessment work on the claims all fall.

This talk took place out there on the Atlas. This contract was executed right away as soon as Mr. Steinfeld got back to town. The whole thing was closed up. Mr. Franklin prepared that contract. I did not have anything to say about the terms of this contract to Mr. Franklin.

Mr. HENEY:

No other writing was executed relating to the Nielsen stock by me

as president of the Silver Bell Copper Company or the Nielsen Mining and Smelting Company to Albert Steinfeld.

Q. Was anything said about who would pay for it other than is said in the contract?

A. Nothing more than he said he would pay for it.

The whole talk was out there at the mines in the first place.

He said that he would give them \$2,000 and then he would give them \$10,000 when these mines were sold. I mean when the Old Boot mine was sold.

The conversation was with Nielsen.

There is a letter in evidence here from Mr. Steinfeld to Mr. Zeckendorf in which it is stated that at the time of the shutting down in December 1899, the ore in the Old Boot mine was within twenty feet of the English group. That was not correct. It was about 200 feet, two or three hundred feet from the closest of the English mines.

Q. At any time prior to Mr. Steinfeld's starting to Europe did you while president of the Nielsen Mining and Smelting Company or the Silver Bell Copper Company have any talk with Mr. Steinfeld in regard to the corporation borrowing money with which to purchase the English title to these claims adjoining the Old Boot mine out there or what is known as the English group of mines?

A. No, sir.

288 I had no talk with him about the Nielsen Mining and Smelting Company or the Silver Bell Copper Company buying them in any way. I had no correspondence with him on that subject after he started to Europe. When Mr. Steinfeld returned from Europe I first saw him after that in December, 1900.

He told me that he had bought the English group of mines and he wanted me to go out and take possession of these mines for him, and I then asked him if we could take any ore off of these mines and he said yes, all the ore you can find, and then I explained to him that on the Yankee there was an iron outcrop and it carried good copper values and it would pay to work there and get out some of that iron. I said would we have to pay \$1.25 a ton for the ore that we took from these mines, the same as we had to pay William Zeckendorf for the ores that came off of the Old Boot, and he said No. I don't want to charge the company any royalty. I will give you all the ores you can get, but you must not bring the company or me, I mean, in debt any more. You are perfectly welcome to that ore, but I don't want you to bring me any further in debt than I am at the present time. I wanted to use the ore on the Yankee mines in the furnaces. It was iron and iron was mighty scarce in there. It was worth about \$20 a ton; we had to pay that for it.

289 I started up in September 1900.

Q. What, if anything, did you do on those other claims, on the English group, I mean?

A. We didn't touch them.

I think the assessment work had been done at the time I had the talk with Mr. Steinfeld on the English group of mines for the year

1900. I think it had all been done. The first time that I did any work upon any of these English group of mines, I think it was on the Yankee. The first we did was getting that ore out. I should think it was right away after Mr. Steinfeld returned in 1900 or in January 1901 or February, I couldn't say exactly.

I was there with Mr. Louis Zeckendorf in February, 1901. The smelter was running then.

In this conversation with Mr. Steinfeld in regard to the assessment work on the English group of mines we agreed to do the assessment work on all that group. He said he wanted the Silver Bell Copper Company to do the assessment work on the different mines and whatever ore came off the claims was ours. That is about the sum and substance of that. I don't know exactly when this conversation was, but it all followed after he came back from Europe. I was out and in quite often and it may have been in December or the latter part of January.

290 I remember as president of the company, signing a certificate for 300 shares of stock in the name of Albert Steinfeld, trustee, the record of which shows on the stub as certificate No. 5. Mr. Louis Zeckendorf asked me to sign it, in the office of L. Zeckendorf and Company. I don't think there was anyone present except us. Mr. Steinfeld was not there. He did not show me at that time any writing on the back of the stub. I did not see any writing on the back of the stub at that time. Not a thing further was said about it. He simply asked me to sign it and I saw the other stub in the book and so I signed it. There was another stub in there, another certificate. Certificate No. 2 I said it was on the stub cancelled by the issue of No. 2; here is No. 2 in the book.

It was there at the time I was requested to sign certificate No. 5. The next time that I saw that certificate or had my attention called to the stub in this book to certificate No. 5 was some time after that. I could not say how long. I don't think certificate No. 5 was in the book when I saw it again. Yes, it was; that is right; they were all in there. Let me see, that was in 1901. It was after Mr. Steinfeld got back from San Francisco, as near as I can remember 1901. It must have been in March or April, or somewhere along there. Mr. Steinfeld called my attention to it and asked me why

I had signed that certificate. I explained that Mr. Zeckendorf had given me the stock book and requested me to sign it, and then Mr. Steinfeld turned around and said that Mr. Zeckendorf claimed that he was only a trustee or something to that effect and anyway, I went up to see Mr. Franklin.

291 He said that it was the stock he bought up and paid for and that it was his stock and that Mr. Zeckendorf claimed that he was only a trustee. Something was said about the English mines at that time. The whole thing came up about the mines and everything.

There was a good deal of talk about the certificates of stock and about the English mines and the sum and substance was that I had a talk with Mr. Franklin. It must have been about March or April, it was just after Mr. Steinfeld came back from San Francisco.

Now, let me get started on this thing. First of all, this stock

came up and he asked me why I signed it, and I told him why I signed it. I told him that Mr. Zeckendorf asked me to sign it and I signed it and then he said that Mr. Zeckendorf claimed that he was a trustee for the stock. That was it and he said he claimed the stock as his own. I think that was all that was said then. That

was the substance of all that was said at that time. I went
292 up to see Mr. Franklin and I explain'd the thing to Mr.

Franklin. Mr. Franklin said that Steinfeld could only be a trustee, anyhow, and the thing wound up by Mr. Steinfeld saying, well, I want my money, that's all I care about. I think Mr. Franklin came down to Mr. Steinfeld. There was further conversation while I and Mr. Franklin and Mr. Steinfeld were together. Mr. Steinfeld claimed the stock as his, and after talking the thing over, as near as I can remember, Mr. Franklin claimed that he was a trustee. I think it was at that time that we talked about the English group of mines and all of them. Mr. Franklin said that he could only hold them as trustee, and finally, after a great deal of talk Mr. Franklin said, you have got to give the company or the stockholders a chance to buy these mines. Now you will have to give the company an option so that they can buy these mines and if they don't buy the mines, then they will go to Mr. Steinfeld.

I won't be sure as to whether all of these conversations were at one time. There were so darned many conversations that I can't remember them all. There were so many conversations and it was so long ago that it is pretty hard to remember.

Mr. HENEY: I am showing the witness page 246. What book is that?

A. That is a ledger of the Silver Bell Copper Company.
293 That book was kept at the mines. Young Kennedy, the bookkeeper did the writing in it. I had no supervision of the books. I recall the entry on the top of the page headed, Albert Steinfeld, trustee, with lead pencil writing, the Mammoth Copper Company came to be entered in the books. Mr. Steinfeld sent us out a statement and a letter. I have not that letter and statement.

Mr. IVES: We will furnish a copy of it.

Mr. MESERVE: I think it would be better to read it into the record.

Mr. Ives reads letter into record.

MAY 19, 1901.

DEAR MR. CURTIS: Mail late today, so won't go until tomorrow. Enclosed find memo. disbursement Mammoth Company showing \$9501.79 paid out. I think you better credit me on your books as trustee for disbursements in the matter, or if you think best will ask Franklin just how to make this entry. Now, though I think that inasmuch as I am holding same in trust for the company it should so appear on your books. There is due me ten months' interest on this, average same at July. Or can you send
294 me the check for \$950.17 and also for \$200 as ten months' interest on \$2,000 Nielsen stock purchase, and I think I

would open up another account as trustee crediting me with \$2,000 deposited July 3rd, 1900. I wrote you yesterday that matter with Alfred is settled and you will not be interfered with. I am very anxious, however, to find a good mining superintendent there to take full charge and relieve you of this loan and also allow you to stay at Mowry and there make or break same. I am getting very much alarmed at the continued increase of this account without any assurance yet of being able to reduce same or even make it up. There is no use crying over split milk but I cannot understand how you could possibly get me involved in this Mowry as you have after all the talk on this subject. There is one thing dead sure and that is if it continues this way and if I could have shut same down as I wanted to last December, it would have been the proper thing to do. I am only afraid that this will dilly-dally along yet before you get this mill started again and we know just what to expect. I hope everything will continue along satisfactory out there, but I am very anxious to know just how matters stand there. I am yet undecided to go with Mrs. S. or not. I hate to leave here now and may conclude to send Mrs. F. S. off today. It was a very great mistake to have had her down here not alone as she made herself but everybody else around her miserable. Besides making me an almost nervous wreck, and it is taking the vitality out of me when I know I most need it.

With love to all,

Yours,

ALBERT STEINFELD."

Q. Then follows the statement,

Mammoth Copper Company Disbursements.

1900.

May 18, Jul. Volkert	\$1875.00
June 16, Star Publishing Company	15.00
July 27, Globe Minerals Exp.	750 pounds
Above that	3665.63
Total carried out	3680.63
Oct. 4, Mrs. Francis	673.65
Nov. 24, Globe Minerals	8485.00
Total	1158.65
Nov. 24, Recording something	15.00
C. W. Wright	100.00
Total	115.00

1901.

Jan. 5, Recording	4.00
European expenses	2668.51
Total carried out	2672.51

Pending Adjustment with Globe Min. Exp. Co. . . \$9,501.79

\$1515.00

296 This letter and statement were received by me after this conversation I have just testified about between Mr. Franklin, Mr. Steinfeld and myself.

(Handing witness book.)

That is the journal of the Silver Bell Copper Company. It was always kept under my supervision. The writing was done by Arthur Kennedy.

Q. It is plaintiff's exhibit No. 114. I will call your attention to page 132. At the bottom of the page appears an entry dated March 21st, Albert Steinfeld, trustee, \$9501.79. And then an item May 18th, 1900, to Volkert, \$1875; all these items here are just as they were read in that statement.

That was entered in this book May 21, 1901.

Q. It appears on the page headed March 1901?

A. It was merged back on the March accounts.

I expect Kennedy did that. The entry was made on receipt of this letter and account. It is dated March 20. These items are just exactly the same. This is a copy of that. In compliance with the letter I sent interest asked for, on May 22.

Q. I will ask you to turn to the ledger. This is an exhibit also. It is Plaintiff's Exhibit 115; it is the ledger of the Silver
297 Bell Copper Company. On page 246 you find an account there of Albert Steinfeld, trustee. How did you come to enter that account and when?

A. It was entered on the 21st day of May, in reply to that letter accompanying that account that you have just read.

That shows a check on the 22nd of May. I inspected these entries in these books every day. I had to make daily entries. Every day's entries were made under my personal supervision. I have no personal recollection only from the books and the letter.

When I speak of the books I mean the journal and the letter book and the whole thing as one.

The entry just below Albert Steinfeld, trustee, Nielsen Stock Purchase; there is a check there of \$200 and a credit of \$2,000. That account was entered in the books May 21st. That \$2,000 is dated May 19, 1901. I mailed these checks to Mr. Steinfeld.

Mr. HENEY:

Q. I will call your attention to page 159, Plaintiff's Exhibit 114, to an entry on the bottom of the page; it is the last entry on the page. Albert Steinfeld, trustee, it is the Nielsen stock purchase; \$2,000; when was that entry put in the books?

298 A. About May 20th or 21st.

Prior to that time I made no entry in the Silver Bell Copper Company's books in relation to the purchase of the Nielsen stock or of the English group of mines, or of the Francis or Volkert titles.

Mr. HENEY: These accounts which I have been asking you are offered in evidence.

Argument by counsel. No objection interposed to any question.

At the time of the receipt of that letter nothing had been done to develop the value of the English group of mines any further than they showed at the time I went there, with the exception of the little work that had been done on the Yankee. Very little work had been done on the Yankee at that time.

I took charge of the mines and remained out there myself in charge of the mines on July 6, 1901. Up to that time no development work had been done on the English group of mines showing the value any more than they showed at the time of the purchase, and no work had been done on them other than this work on the Yankee. On July 15, 1901, no work to speak of had been done upon the English group of mines from the time of their purchase.

I may say that there was no work done at all besides the 299 work on the Yankee. The first work of any extent we commenced about August, and by the—well, it was along about the 1st of September that the property began to develop very nicely. I am speaking of the English group, that means the Imperial, Southern Beauty, Page, etc. It was after the first option of July 15, 1901 and prior to the removal of the option in October, 1901. I don't think there was any correspondence between me and Mr. Steinfeld further in regard to that between May 19, 1901, other than the sending of these checks on July 15, 1901; any written correspondence.

There was conversation between me and him or between me and Mr. Franklin; there were quite a number of conversations I should think in the latter part of June or the early part of July, 1901. The sum and substance of these conversations was this: pretty near all of them Steinfeld was claiming the mines as his property that he was trustee and would have to give them up to the stockholders.

Q. Now, then, were you present on July 15, 1901, at a meeting—I call your attention to the record of the seventh meeting of the board—of stockholders on page 27 of the minute book of the Silver Bell Copper Company (showing witness minute book) and I will ask you to look over that record (witness examines book).

300 Now, I will call your attention in connection with those minutes to a document introduced here in evidence and marked Defendants' Exhibit "F" in case of Franklin against the Silver Bell Copper Company. Just look over that. It is the second paper there; there seems to be two documents attached together there. Was the second one the contract referred to in the minutes here where it says that Steinfeld presented to the board a proposition in writing on July 15, 1901?

A. Yes, sir.

Mr. HENEY: This is a document dated July 15th, 1901, which is defendants' exhibit "F" in the case of Franklin against the Silver Bell Copper Company, No. 3398. We will offer it in evidence in this case, the whole of it. It speaks for itself.

The COURT: It may be admitted.

Mr. HENEY: This document is the proposition referred to in the minutes I have just read.

Mr. Heney reads proposition.

301 Mr. HENNEY: The assessment work had not been done on the English group of mines prior to July 15th, 1901, for that year. It was done in the fall.

Q. Now, the last paragraph reads as follows: Three, (Reading from the minutes of July 15, 1901). Now, there is an agreement attached to that proposition; is that the agreement referred to in your preceding testimony? (Handing witness paper which he examines.)

A. Yes, sir.

Q. Up to July 15, 1901, had you entered into another oral or written agreement in regard to that stock?

A. No, sir.

Mr. MESERVE: It is admitted that this is the same agreement that is in evidence.

Mr. HENNEY: Yes, sir.

Mr. HENNEY:

Q. At the time this proposition was presented do you recall any conversation in regard to the interest charged in it, or did you notice that amount of interest charged in it.

302 A. Why the interest was paid.

Q. Was there anything said about the way the interest was computed by Mr. Steinfeld?

A. He claimed twelve per cent per annum; that is all I know about it.

Q. Have you any recollection whether there was any conversation as to how the interest was computed by Mr. Steinfeld or any of the credits allowed?

A. Yes, sir; the interest had been paid on this at that time.

Ten per cent had been paid. \$950 had been paid, and also that \$2000 on the stock. Mr. Franklin said that interest would have to be returned as that was not the way to do it. Something was done in regard to returning that after that. It was returned by Mr. Steinfeld, he sent it back to the Silver Bell Company. I think Mr. Franklin gave some reason for that. I think he said—as I remember it, I think he said that as a trustee he could not collect any interest from the company. At the time it was returned an entry was made in the books of the Silver Bell Copper Company. It was returned sometime after that; in July or August I think; it was the latter part of July or the first of August; it was entered in the journal. I have got the journal there for July and

303 August. It would be in the journal because the journal has these entries in it. It would come in there, if the same check was returned just the same way, because L. Zeckendorf & Co., got a credit for it the moment we drew the check. I drew the check to pay for this on L. Zeckendorf & Co., and immediately credited L. Zeckendorf & Co., with the amount. That is the only way I could do it; just the same as a bank account.

Q. I call your attention to Ledger D of the Silver Bell Company *

marked plaintiff's exhibit No. 115, the last page in the book; there appears there two accounts, Albert Steinfeld's trustee and the Mammoth Copper Company, and Albert Steinfeld, trustee, Carl S. Nielsen stock. Now, does that show the date or does it show the items of the interest that was returned—\$950, 17, under the first account. It shows that does it not?

A. Yes, sir.

It does not show the date it was returned; it ought to be in the journal. There is also an entry in the account returned to A. S. \$9,501.79; the date does not appear that that was entered. It had to go in this way. I will explain why. When the first account was opened there was a credit and Mr. Steinfeld was not charged
304 anything and it put the books out of balance; so when the account was returned or the amount of that interest that settled up the whole thing and we took it off the books and balanced the ledger. A. S. referred to in there is Albert Steinfeld. These entries were made in July or August 1901. I first saw this on the morning when the entry was made. It was the latter part of July or the first of August 1901.

Q. Albert Steinfeld, trustee Nielsen stock. When did you first see that account in the book on that page?

A. The same time as that one which I have just been testifying about.

They were both entered at the same time. It was really one transaction and they both came in at the same time.

Q. It says on there in that account, returned to A. S. \$2,000. Who is A. S.?

A. Albert Steinfeld.

Q. It also says, interest returned \$200.

A. Yes, sir.

The \$950.17 and the \$200 were the checks or the interest that had been charged in the other account. And there was no other account. I remember Steinfeld personally loaning the Silver
305 ver Bell Copper Company when they bought the furnaces. We bought those furnaces from Gardner, Worthen & Goss; we paid for them \$2,000 as near as I can remember.

Mr. HEXEY: I will show you plaintiff's exhibit 119, ledger "C" Silver Bell Copper Co. and I will call your attention to the bills payable account on the top of page 181 to an entry dated July 10, 1899, Albert Steinfeld, \$2,000. Is that the loan you refer to?

A. Yes, sir.

Q. It shows as being entered in B 163, what does that mean?

A. That is Journal B.

Q. Does that appear on the books to have been paid?

A. No. It went right in with the running account and we made a settlement and it left a balance of \$75,000.00 and some odd dollars. It was the last end of some of these smaller accounts, and these lesser accounts were all merged into one and a note given for it.

That is one of the notes to L. Zeckendorf & Co., charged as Bills Payable.

306 Q. Was there only one note to L. Zeckendorf & Co.

A. No.

Q. To Albert Steinfeld?

A. Yes, sir.

Q. When you made your first report, if you recollect upon these mines as an entire report, did you make any such report prior to July 15, 1901?

A. No, not in the entire group; I don't think I did until that fall. I think there was a report made about October or November; that was the first report on the entire group as near as I can remember.

Q. Now, in your report, you use the language—in these reports you use the language, the property of the Silver Bell Copper Company," and you enumerated these different mines; what did you mean by that?

A. I always considered that the option of Mr. Steinfeld gave us the right to offer them as one group to the corporation. I remember going to the mines in November 1901, with Louis Zeckendorf; we went out in a buggy; I think Mr. Zeckendorf drove. No one else was in the buggy with us, just he and I. We talked in a general way about the property; we carried on a conversation pretty
307 nearly all the way out. I don't remember anything particularly on the road out excepting that I felt pretty good over the property and I knew that we all were feeling good because we were in better shape now. Steinfeld having bought all of these outside titles by this time. I knew that we were in a good deal better shape to accomplish something. Well, it was a pretty hard thing to sell one mine alone, and by Mr. Steinfeld owning the adjoining mines, I knew very well that they would go as one group and that the Old Boot would bring a greater price; in fact I don't believe you could sell it single at all. We had been offering to sell it before for that, I think, \$150,000. Mr. Zeckendorf went up to the mine with me. He did not want to go down in the mines. We were standing on the top by the shaft there and I explained everything in detail as much as I possibly could, and I told him where the ore was, and how it went down and how it was going to open up and where it was passing through and gave him an idea of how far it had left us in depth, and about its magnitude.

Well, the outcrop on the Old Boot showed 100 feet wide and over on the Prospector and adjoining claims you could see from the Old Boot that it was probably wider. I told him about the Prospector; certainly that is what I explained to him at the time, which
308 way the ore was going. I think it came up about that Elliot claim. I told him where that was and where outside lines were and about the outcrop up there and how it was passing down with the Old Boot outcrop and that it was passing to the south and was going into the Prospector which was what we call one of the Silver Bell claims, I mean one of the English company claims. They were bought at that time by Mr. Steinfeld and I felt particularly good about it, because we could be able to get this iron for flux and I showed him where we were getting the iron out of the Yankee. I said something about whose claim the Yankee was; we always called it one of the Silver Bell properties. I don't think there was anything said about the ownership then.

Mr. Steinfeld had just got back from Europe. A map was shown to Mr. Zeckendorf; he saw the maps, the surface and the underground were all in one. They showed all of these English claims and the Old Boot claims. The names of the claims were on there; they were all printed on there. Mr. Zeckendorf had been out there with me on another trip previous to that. He had been out there at the time William Zeckendorf was out; I suppose it was a year before that.

Q. When he was out there with William Zeckendorf was anything said about the adjoining claims?

309 A. It all came out at this time.

It was said that we ought to own all these adjoining claims. It was not declared that we did own them. We did not own them at that time. I said Zeckendorf & Co., should own these adjoining claims; that was in 1900. William Zeckendorf and Louis Zeckendorf were both out there. It was along in the spring as I remember. It was after I had organized the Nielsen Mining & Smelting Company. Just after that. When they came out there, all Wm. Zeckendorf's interest was bought and Mr. Zeckendorf was out there to examine the mine it was during that examination when a conversation came up about the Old Boot and the adjoining property. I explained to them the necessity of owning the adjoining property. I showed them on the outcrop how these croppings continued from the Old Boot into the other claims. To the best of my recollection we stood on the ground, all of us. Mr. Steinfeld was not there. Wm. Zeckendorf and Louis Zeckendorf came out there and William Zeckendorf went underground with us and then I undertook to explain to William and Louis the outcrop in the Old Boot and the outcrop on the adjoining property. I am trying to give you the conversation. This outcrop of the Old Boot mine, from there is the same outcrop
310 on the Prospector mine and I remember of pointing off in the distance and showing them the outcrop on the Red Rock and Atlas mines.

I said that green dump over there is the Atlas and the Red Rock properties, all of which we were trying to get at that time and over there, I pointed to the Yankee, and I stated that that was one of the Silver Bell group and I showed them the end lines of the Old Boot.

I said that the ore came from the north on the end line of the Old Boot and that the end line passed where we were standing, passed into the Prospector and that it was one of the Silver Bell claims. I do not know whether there was much more said at that time.

When Louis Zeckendorf was out there in February, 1901, with me the conditions had changed in regard to the ownership of the surrounding claims.

Q. Was anything said about it, by you or by him?

A. When Louis Zeckendorf and I got on the ground I showed him the outcrops on the Old Boot and I took him over and showed him the manganese that was there, I showed him and explained to him that that was manganese and I stated to him it was manganese.

311 I said to him that it was manganese, and I had to explain to him the meaning of manganese.

I said to him that it was the thermal action and a part of the hot waters had brought up the ore and I showed him at the same time the eruptive rocks and I also showed him from where we stood that you could see where it came into the Old Boot and where it was *was* passing to the Prospector. I showed him that and I explained what they all meant and then expressed myself as being very much pleased now on being able to follow all these ores, for they went into the Silver Bell properties, and I pointed right over to the Prospector and I said, that is the Prospector mine.

Q. Now you say you expressed yourself as being much pleased. How did you express it? By your looks?

A. No, of course not. By conversation.

Q. Well, what was it you said?

A. That I could now follow the ore into the Prospector if it went there.

Q. Did you say why?

A. Because Mr. Steinfeld owned the mine.

Q. I am asking you what you said?

312 A. I think it is more than reasonable that I said it.

Mr. HENEY:

Q. Never mind now, I want to know what you said?

A. We also spoke of the mines as the Silver Bell group.

Q. Never mind that, I want to know what you said. Were you not working the Silver Bell in 1899?

A. No, sir.

I spoke of them as the Silver Bell.

Q. What was said, if anything, about Mr. Steinfeld's trip to Europe, was there anything said, was the subject referred to on that trip out there to the mines with Louis Zeckendorf.

A. I don't remember what was said on the trip going out there.

Q. When you went out there and on the way back, was anything said during the time about Steinfeld having been to Europe?

A. I am sure that we spoke about Steinfeld's return from Europe and his getting hold of these mines.

313 Mr. IVES:

Q. What did you say about Mr. Steinfeld returning from Europe and getting hold of these mines?

A. Well, we — standing on the Old Boot mine dump and we were talking about the Prospector mine and the Elliot mine and we turned around to the Yankee mine, both of which were of the English purchase.

COURT: Have you any personal recollection of anything that was said about his return from Europe at that time?

A. I can't think of any particular conversation we had about it; but it all came in a general way.

Mr. HENEY:

Q. What came in?

A. Why, whatever was said.

Q. If there was not anything said, say so. If there was anything said, give us your best recollection.

A. I don't remember.

I showed Mr. Zeckendorf the map and I told him what we
314 were going to do and when we were talking about that map

I explained to Mr. Zeckendorf where we were working about that map; I explained to Mr. Zeckendorf where we were working and what we were expecting to do. Here is the map where we stand, that is the Mammoth and here is the smelter down here and here is the Apache and we rode from the smelter which is on the Apache claim; we rode in the canyon to the Omaha and the Mammoth Copper claim and to the Old Boot, and I showed him the lines on the Old Boot as we stood there.

When I was driving up from the smelter to the Old Boot, I showed him something. I talked to him about this whole country and about the ore and that this all belonged to the Silver Bell group and that it was located by me. I told him so then when we got onto the Mammoth Copper Mine the lead was here and I explained that we were continually working on this ore toward the Prospector and that I was satisfied that it went into the Prospector on the other side. I felt very good over the whole proposition. I knew or I was almost satisfied that the ore would pass from the Mammoth into the Prospector.

Q. How did that interest him?

A. Why, I could now go to the Prospector as it belonged to

315 Mr. Steinfeld and I explained to Mr. Zeckendorf that this was one of the Silver Bell purchase.

Mr. MESERVE: Is that the way you explained it?

A. That is the way I explained it, yes, sir.

Q. Did Mr. Zeckendorf ask you what you meant by the Silver Bell purchase?

A. I suppose he knew it.

J. N. Curtis.

J. N. CURTIS, called as a witness for the defendant testified as follows:

Examination by Mr. IVES:

Q. Now, Mr. Curtis, in your conversation with Mr. Zeckendorf at the mine in February, 1901, do you remember whether in the course of those conversations anything was said by either of you in which incidentally or directly the fact of the purchase of any new mines recently was mentioned?

A. Yes.

Q. Now, will you please state what was said by either of you at the mine in February, 1901, either incidentally or directly referring to any recent purchase of any mines in that district?

316 A. Well, I said that the ore of the Old Boot mine we could now follow it.

We could now follow it, that there would be no danger of being stopped by going too near outside property. That the prospect now of the Silver Bell Mines, as we called it, which meant the Silver Bell purchase, that we could follow that ore into that Prospector mine. There was no more danger of getting too close to the side or end lines because we now owned these lines and we could follow that ore. That was the sum and substance of the conversation.

Q. Was there any reference made to the conditions between the time when you could not follow them without danger and when you shut down and the fact that now you could follow them without danger?

A. Mr. Zeckendorf knew that we shut down virtually for the reason that we were going too close to the outside lines, to these side lines and end lines. That now was removed, and that is why I explained and expressed myself very frankly that the future was assured, that there was no question but what we could make a big property out of it. I didn't care where the ore went we could follow the ore; we owned the adjoining mines. This was in February

317 1901. The prospect now was certainly very much more encouraging in my opinion and the prospects of success in that enterprise were more encouraging than they had been before. Certainly, because we owned the adjoining mines. I said something to Mr. Zeckendorf with respect to whether the prospects were more encouraging than they had been I thought the prospects now were more encouraging, when I say now, I mean February, 1901, were more encouraging than they had been in the past, because we owned the adjoining claims. At that date, February, 1901, I explained to Mr. Zeckendorf why I thought the mines were more encouraging now than they had been, and in explaining to him as near as I can recollect, I said to him in as many words, that the ore of the Old Boot mines was running into the Prospector mine, and there was no danger of our having to stop, that we could go into the Prospector mine after it.

Q. Mr. Curtis, what did you mean by the language that you used, that we now owned the mines in February, 1901.

A. Because Mr. Steinfeld had bought the English group of mines.

When I stated to Mr. Zeckendorf as I have testified that now we owned these mines, and we can now go into the Prospector, Mr.

318 Zeckendorf did not express or indicate that he did not understand me. He showed no surprise. He did not ask me how we got them. He did not ask me the nature of the ownership.

I showed Mr. Zeckendorf a map similar to the one that the defendants put in evidence in this case, marked "Exhibit A."

The mines which I located myself appear upon that map. The Silver Bell group of mines, the English mines appear upon that map. The mines originally owned by the Nielsen Mining and Smelting Company appear upon that map.

Q. In showing Mr. Zeckendorf the map at the mine in February,

1901, did you make any reference in your conversation to the mines which you had located?

A. I showed Mr. Zeckendorf the claims that run from the furnace which is on the Page up to the Old Boot mine, all of those claims belonged to the Silver Bell Copper Company, then, I showed him the claims, the Elliot claim; I showed him whereabouts would be the Elliot claim. It was not on the map because it did not belong there, and then showed him the Silver Bell group as we called it.

I don't think Mr. Zeckendorf made any remark whatever. I just described the map.

319 I said, starting right from the page where the furnace was, with this group, over to the Mammoth Copper mine, was the Silver Bell Copper mine. In explaining the map to him, that this here was the Silver Bell group (pointing to the north on the map) north of the Mammoth and this here east of the Mammoth, and south of the Mammoth, indicated on the map, that is the only explanation of the map there was. That is the only explanation I gave him on that map.

Q. Mr. Curtis, I think you testified you took ores from the Yankee mine, and used them in the latter part of 1900 or first part of 1901 in connection with the ores of the Old Boot mines?

A. Yes.

Q. How did the value of the ores, that you took from the Silver Bell group of mines, or the group that Mr. Heney designated as the Steinfeld group, compare with the value of the assessment work upon such mines?

A. The ore was largely in excess of the amount of work done. I mean by that the cost of the actual work.

Judge Barnes had an option on those properties prior to December 1900, for \$150,000. I know what we were holding that group
320 of mines for after December, 1900. The whole group taken as one group. The price put on the mines after the first of January 1901, was from five hundred thousand dollars to seven hundred and fifty thousand dollars for the whole group.

Q. Did you consider the group of mines which you were after the first day of January, 1901, more valuable than the group of mines which the company was offering before December, 1900?

A. Of course, I did.

Q. Why?

A. In the first place there was double the amount of mines, and the showing on the Old Boot group was simply on the Old Boot mines, and the other group was on the Imperial—and the showing on the other group was on the Imperial, Southern Beauty, Union, Comet, Page, each one was just as good, if not larger surface crop-pings, certainly as good as the Old Boot.

Q. Did you ever say anything on the subject to Mr. Zeckendorf—his letters are here?

A. Why, certainly. I think my letters are in evidence I wrote him to that effect.

321 I have not any of the letters Mr. Zeckendorf wrote me in reply to those. I don't think he ever wrote any letters in

reply to them. I have seen Mr. Zeckendorf since I saw him in 1902. He never asked me about the Silver Bell purchase.

Q. When you wrote those letters and referred to the mines as the Silver Bell purchase, did you write with the conviction that Mr. Curtis understood what you meant?

A. Yes, certainly I understood.

Q. Now, Mr. Curtis, what was the relative value of the mines owned by the Nielsen Mining and Smelting Company, and the mines known as the Silver Bell group on the 20th of May, 1903, in your opinion?

A. Yes, I can say that the English mines, on May 20th, 1903, when the Silver Bell Copper Company, sold everything, as a group was much more valuable than the Old Boot mine, or the Silver Bell Copper Company's old holdings.

I had been in charge of these mines from the incorporation of the company, until they closed down. On the 16th day of January, 1904, I entertained the same opinion of the respective values of those mines as that I have just expressed. Prior to the 16th day of January, 1904, I had conversations with Mr. Shel-
322 ton with respect to the relative values of the English group of mines and the old holdings of the Nielsen Mining and Smelting Company on the 20th day of May, 1903.

I continually explained to Mr. Shelton—

Mr. MESERVE: We object to the statement, he continually explained to Mr. Shelton. Tell what you said and when and where.

A. I told Mr. Shelton how the Old Boot was progressing. I explained the English group of mines were being opened up by the quarrying system; that they were very cheaply developed, exposing large quantities of ore that was very valuable to us in our smelting proposition at Red Rock, or at Silver Bell; the tonnage exposed by that work that we had gone into the middle of the group and sunk a fifty foot shaft, which being sunk down the mountain was equal to 100 foot of outcropp and we had already developed 100 feet of ore on the center of that group called the Southern Beauty, that we had the sulphide ores there, that the ore exposed on the English group of mines was at least five to one of what was exposed in the Old Boot and the work that was being done on the
323 English group of mines was more than carrying out that proposition of tonnage as to the two properties.

These conversations were at my office, 48 W. Pennington street, and in the store of L. Zeckendorf & Co. but more often in my office and were held every time I came in town.

Within three weeks before the 16th day of January 1904, I had a conversation with Shelton as to the relative value of the mines on the 20th day of May, 1903, as they existed on the 20th day of May, 1903, as they existed then. I had such conversation with Mr. Shelton in Tucson. I had more than one conversation with Mr. Shelton on that subject prior to the 16th day of January, 1904, and after the 26th day of December, 1903. I had several such conversations with Mr. Shelton.

Q. What was said by you and him between the 26th day of December, 1903, and the 16th day of January, 1904?

A. I explained to Shelton—

Well, I told Shelton how those figures were arrived at by the different engineers in their reports. That first came up as an issue, and in carrying out that argument with him, I told him the tonnage on the English group of mines, and the tonnage in the Old Boot mine.

324 Q. What tonnage did you say there was?

A. Fifty thousand tons in the Old Boot mine, and two hundred and fifty thousand tons on the English group.

I believed at the time that I was telling Shelton that I was telling him the truth. I believe now that that was the truth.

Q. In these conversations that you had with Shelton prior to the 16th day of January, 1904, did you have any view of the action of Shelton and yourself as directors of this company?

A. None whatever.

I attended the meeting of the 16th day of January, 1904. Mr. Shelton attended that meeting. Resolutions of that meeting were prepared prior to the 16th day of January, 1904. The resolutions were, I won't be sure about the minutes.

Before the resolution was passed by the directors on that day there was conversation or discussion of the resolutions held at which myself and Mr. Shelton were present.

Q. State what that conversation was.

A. In regard to that resolution?

325 Q. Yes.

A. Well, in substance it was that Mr. Zeckendorf was—

Q. I don't mean the resolution of rescission.

A. Which one do you mean?

Q. On the 26th day of December. I had better show it to you. Just read that resolution Mr. Curtis. (Minute book handed to witness.)

Mr. MESERVE: It is understood that all this goes in under our objection that it is incompetent, irrelevant and immaterial.

Mr. IVES: As I understand it, you don't attack the action of these directors on the ground of disparity of value.

Mr. MESERVE: You will have to find out from the pleadings in the case.

Q. Did you have any conversation with Mr. Shelton prior to the adoption of that resolution and discussion of it?

A. Yes.

326 At that discussion between us I said at that time that I was satisfied that the Silver Bell Copper Company—a very good proportion of the sale price, and that I thought Mr. Steinfeld as now the owner of the Silver Bell group was entitled to one-half of the sale price, less commission and I did think so.

Q. Did Mr. Shelton say anything as to whether he thought so or not?

A. He seemed to agree with me.

Q. Was it your habit Mr. Curtis or not to have conversations with Mr. Shelton about the various mining properties of Zeckendorf & Co.?

A. Very common between us and is today.

I had many such conversations with him.

Q. Now, Mr. Curtis, with respect to the meeting of the directors of the Silver Bell Copper Company on May 20th, 1903, that being the date when the trade with the Imperial Copper Company was completed, do you remember whether or not as a matter of fact, the directors had a meeting on that day?

A. I am not sure; I think they did.

Q. Now, I will try to refresh your memory?

327 A. I think that is the day the notes were all signed. Yes, we had a meeting in Mr. Franklin's office.

Q. Are you familiar with the minutes of that meeting as they appear on this minute book?

A. We were at Mr. Franklin's office; I believe it was in the afternoon.

Q. Do you remember discussing about May 20th, 1903, the execution of a contract providing for the disposition of the purchase price to be received from the Imperial Copper Company, and providing for the security to Mr. Steinfeld for certain alleged guarantees he had made?

A. Yes, I remember that.

I remember Mr. Franklin reparing or submitting a contract with respect to what we gentlemen had agreed upon in that matter.

Q. Now, when was that contract?

A. You mean that long contract?

Q. Yes, now you know what I mean.

A. It was some days before.

The 20th of May was the date upon which the Imperial Copper Company paid the money and delivered the notes. Between
328 the 13th day of May and the 20th day of May, Mr. Goodrich and Mr. Robinson, the lawyers for the Imperial Copper Company were here examining the titles. During that time between the 13th and 20th, this contract was prepared by Mr. Franklin, and submitted to us. Mr. Steinfeld said it was too long, too much of it; it expressed our views all right but he wanted it in shorter form. At that time when Mr. Franklin presented that contract, I think the minutes were partly written. I think some of them were scratched out in the contract. Mr. Steinfeld refused to sign that contract. He said he wanted the same thing but wanted it condensed.

Q. Was this second contract the short one that was prepared by Mr. Franklin and presented for signature before or after the 20th day of May?

A. It was after a day or two—it was right shortly after—I think, as near as I can remember. No, I believe that short contract and the whole thing was ready by the 20th of May.

Q. Then the minutes were changed when the minutes were presented?

329 A. Yes, by scratching this out, and going right on again. And that second contract that was prepared by Mr. Franklin was executed prior to the delivery of the money and the notes by the Imperial Copper Company.

These minutes were written prior to this, prior to the delivery of the money and the notes by the Imperial Copper Company; all the papers were signed at that time. Mr. Shelton was present at this meeting held on the 20th of May, 1903, in Franklin's office. He was secretary. The minute book and stock book of the Silver Bell Copper Company were kept during the years 1901, 1902 and 1903, in the safe of L. Zeckendorf and Company in Tucson. I have taken them out. Some of these minutes are in my handwriting; I put them back when I took them out; right in the same place; sometimes they were tied together; I always tied them together and with the name on the outside, Silver Bell Copper Company, and sometimes I found them with the wrapper off. They were always kept in the safe. They were always together.

Cross-examination:

In the month of January, 1904, I was president of the Silver Bell Copper Company.

I didn't know what arrangement there was between Mr. Steinfeld and Mr. Zeckendorf. So far as I knew, as president of the Silver Bell Copper Company and as director, I hadn't consulted Mr. Louis 330 Zeckendorf about the division of the money. I knew he was a heavy stockholder in the corporation. And I knew he was the owner of 250 shares of that stock and therefore vitally interested in any proceeding by which the proceeds of that money was to be divided. I appreciated the fact as president and director of that corporation that I was his trustee.

Q. Why didn't you go to him, and ask him about the intended action?

A. I was in New York that fall and I met Mr. Zeckendorf in New York and he asked me a great many things and I answered every question; he asked me about the Silver Bell affairs; he treated me very nicely. Mr. Zeckendorf left New York ahead of me, and came to Tucson, and the first thing I heard of Mr. Zeckendorf was that he had gone to California; he had filed a complaint in California charging me with fraud in the participation of his affairs, and why should I go to Mr. Zeckendorf after that for anything. Why didn't Mr. Zeckendorf come to me.

I got back to Tucson from New York about the 23rd of December, 1903.

Q. Now, then, because you had ill feeling towards Mr. Zeckendorf and on account of that you didn't go to him and explain to him any intended division of the company's money?

331 A. I didn't go to Mr. Zeckendorf; I didn't approach him in any way, shape or form. I knew that the only other parties interested in that fund was myself and Mr. Steinfeld.

I knew that for this two hundred and seventy-nine thousand dollars figuring the thirty-three thousand dollars on the Silver Bell

Company's stock, was given to Mr. Steinfeld in the manner in which it was, and that I was depriving myself of something like seventy-two thousand dollars, and Mr. Zeckendorf of something like one hundred and ten thousand dollars.

Prior to that time I had been working for one hundred and fifty dollars a month and my expenses. No, previous to that they paid my expenses and salary. I did not consult anybody except Mr. Eugene S. Ives about the legal obligations in this matter.

Q. You did not feel called upon to go to any person who was not the attorney for Mr. Steinfeld as to whether or not you, as a director and president of the Silver Bell Copper Company, owed it to you and the corporation and to Mr. Zeckendorf to have a resistance or make a resistance to that action, did you?

A. No, sir; I didn't do anything.

Q. You simply gave up seventy-two thousand dollars in money?

332 A. I gave up my interest, whatever it may be.

Q. Seventy-two thousand dollars out of ninety thousand, you only got eighteen thousand?

A. Eighteen thousand one hundred and seventeen dollars.

Q. And you knew that if you hadn't taken that action you would have gotten \$90,000?

A. No, sir.

Q. Why not?

A. I am satisfied I would. I am positive I would have gotten it if there had been no trouble between Mr. Steinfeld and Mr. Zeckendorf.

Q. Now, Mr. Curtis, when was the first time that you and Mr. Steinfeld discussed the division of that money?

A. The first time we discussed the division of the money?

Q. Yes.

A. After the re-cission of the vote of the stockholders' meeting rescinding that contract.

Q. After the directors' meeting that same day?

A. No.

333 Q. Did you discuss it with him between the stockholders' meeting and the directors' meeting?

A. First of all, Mr. Steinfeld gave me back \$18,000.

Q. Answer my question. Did you discuss that matter between the adjournment of that stockholders' meeting and the convening of the directors' meeting?

A. I don't remember.

Q. Do you think that you did?

A. I don't remember. I don't think that I did.

Q. Now when did he give you that \$18,117?

A. Right after the stockholders' meeting.

Q. Before the convening of the directors' meeting.

A. No; I don't think it was; it was after.

Q. What was the first thing said to you about paying you back any money?

A. The first said back, what——

Q. Was that the first thing said to you about his paying you back any money, and why did he say he was paying you as president \$18,117; what did he say?

331 A. The stockholders' meeting had rescinded this thing for him to pay us back this money.

Q. Did the stockholders' meeting say one word about \$18,000?

A. Rescinded the contract.

Q. Who told you that had the effect of rescinding the contract, Mr. Ives?

A. That is the way I understood it myself.

Q. Is that what Mr. Ives told you?

A. I don't know who told me, whether it was Mr. Ives or not, that is the way I understood it.

Q. When — the first time there was any discussion about giving Mr. Steinfeld back any note calling for \$145,000 in money?

A. I think it was all suggested about that time.

Q. You heard Mr. Steinfeld's testimony that there was no such discussion until within a week or two weeks of January 16th, 1904?

A. No, I don't remember it.

Q. If he did state that way, on the witness stand, was he telling the straight of it, or you?

335 A. I say I don't remember when that division did occur. He turned it over——

Q. I asked you when the first thing occurred when the statements first occurred about dividing up that money?

A. I don't remember when it was.

I don't remember that Mr. Steinfeld made any written demand on me for any part of that money. I don't remember whether he made a written demand on me for any part of the proceeds of the sale of the Silver Bell Copper Company's properties. I don't know whether he made an oral demand. He said that he claimed one-half of the sale price for his properties, less commission.

I was president of the Silver Bell Copper Company. I did not resent the demand at all. I proceeded at once and without one single solitary act on my part, voted to give up that amount of money to him.

Q. Mr. Curtis, did you go to Mr. Ives and ask him if there was any legal obligation upon the Silver Bell Copper Company to give up any of that money?

A. I don't think I did.

I don't remember having been director in other corporations. I know that the position of director is trustee, and I understand that it is not only trustee for the corporation but each and every
336 stockholder. I understood that to be so in January, 1904.

Q. Did you, as president of the Silver Bell Copper Company, knowing that Mr. Shelton had but one share of stock in his name, suggest to him that you take independant advice or consult as to what your obligations were to Louis Zeckendorf?

A. No, I did not think it was necessary after the stockholders' meeting.

Q. Who told you what the effect of the stockholders' meeting was?

A. Well sir, I construed it as a director, I was trustee, and when the stockholders had voted every share of the stock to rescind that contract, I construed that as an instruction from the stockholders to do likewise.

Q. Now Mr. Curtis, after that resolution was adopted during the whole hour after that resolution was adopted, when the different parties present, were talking about the funds of the Silver Bell Copper Company, and about depositing those funds as security, and about distributing those funds amongst the stockholders, what did you at that time understand that meant? For a whole hour after the adoption of that resolution they were talking about distributing that money among the stockholders and depositing that fund with the treasurer of the Silver Bell Copper Company. What did you understand from that?

A. I don't remember that conversation.

Q. Here is the minute book (minute book shown witness). You were present at that meeting?

A. Yes.

Q. And you heard everything that was said?

A. Yes.

Q. Mr. Ives didn't tell you what the effect of that re-cission before the meeting was; what the effect of the resolution which he had prepared would be, did he?—He showed you that resolution before the stockholders' meeting, didn't he, that he had prepared? I call your attention to this typewritten paper, appearing on page 67 of the minute book; that identical piece of paper with the interlineations?

A. Yes, that is the resolution that was offered.

Q. Did Mr. Ives show you that before the meeting and tell you that he had prepared it?

A. I don't remember.

Q. Did he tell you at that meeting, or before that meeting, that the effect of the resolution would be to deprive you or Mr. Zeckendorf of any money?

A. Oh, I knew——

Q. I am not asking what you knew, I am asking what he said?

A. I don't remember.

Q. Did he tell you at that time, before that resolution was introduced, that it would deprive you or Mr. Zeckendorf of any money?

A. No, I don't remember that he did.

Q. Did you, at the time of this stockholders' meeting was being held, have any such idea that it would deprive you or Mr. Zeckendorf of any money?

A. I knew that it would deprive him.

Q. Why didn't you, a director of the Silver Bell Copper Company, in attendance upon that meeting, make some suggestion before that resolution was adopted?

A. As I already stated, I had been charged with fraud in participation in this business.

Q. And that made you feel pretty mean against Mr. Zeckendorf?

A. I felt pretty bad.

339 Q. And you were willing to sacrifice your obligations to the corporation——

A. I thought it was very mean in Mr. Zeckendorf after all the years I had worked for him and the thousands of dollars I had made for him, to turn around and charge me with fraud. It was uncalled for.

Q. And that was in your mind?

A. It was in my mind, I admit it.

Q. And when you passed the resolution of January 16th, 1904, it was in your mind, and when you divided the money. That was in your mind then, when you passed the resolution of January 16th, 1904; You had that same feeling towards Mr. Zeckendorf, didn't you?

A. Had the same feeling, and have it right now—right along.

Q. Now, I want to call your attention Mr. Curtis, that after the adoption of the resolution at this stockholders' meeting of December 26th, a great deal of conversation occurred and I call your attention to this statement of Judge Barnes, "There is another matter we desire to bring before you. This company has practically sold its assets and has got nothing left but the proceeds of that sale. It has
340 got cash and notes coming in." You understand that statement; the cash that was then in your hands?

A. Yes.

Q. You understood that when Judge Barnes made this statement after the adoption—that rescission of the resolution—that he referred to that cash and those notes?

A. Yes.

Q. And you were presiding as the president of the corporation at that meeting?

A. Yes.

Q. Now (quoting) "It has got notes and cash coming in, there are some obligations, an obligation on the part of Mr. Steinfeld to guarantee the title. Now the guaranties are matters as Mr. Zeckendorf regards as of small moment; he would be willing to assume the obligations of all of them for fifteen or twenty thousand dollars. We do not think that with \$200,000 of money coming in between now and next April, many times more than enough to meet any possible obligations that can come up, including the suit of Mr. Franklin, or any other threatened suits, or to make good the guarantee of good title up to twenty thousand dollars; that it is unjust to
341 a stockholder of this company to hold back the funds as against that; even to hold the funds back against Mr. Franklin's suit. Mr. Franklin's suit cannot possibly be tried until long after the 20th of April. Now, we think it is unjust for these stockholders to tie up this money."

Now did you understand that to be the money which was then in your hands or control as the funds of the Silver Bell Copper Company?

A. Yes, sir.

Q. And as president of the corporation you heard that remark made after the passage of that rescission of that resolution?

A. Yes, sir.

Q. And didn't you call Judge Barnes' attention to the fact that the corporation didn't have any such money?

A. I never spoke to Barnes.

Q. When he was talking there about disbursing that amount of money and you saw as attorney for Mr. Louis Zeckendorf that he was rescinding the company's rights to any money, why didn't you call his attention to it?

A. That he didn't understand that he was rescinding?

Q. Why didn't you call his attention to the fact that he was parting with any money on behalf of Mr. Zeckendorf, why didn't you call his attention to that?

A. I was under a different impression altogether.

Q. You were under the impression that when he said the company had \$250,000 in money and notes, and that he wanted it disbursed among the stockholders that that meant to give one-half of it to Mr. Steinfeld?

A. No.

— What did you at that time understand he meant?

A. I understood that as he expressed it there, there were two notes of \$100,000 apiece, and—

Q. When you spoke about disbursing that among the stockholders, did you at that time, understand that he meant to give one-half of it to Mr. Steinfeld, or that he intended you and everybody else to understand that he had intended it to go to the stockholders proportionately?

A. I cannot say that I paid much attention to what Barnes said.

Q. You were president of that corporation?

A. Yes.

Q. And you were presiding at that meeting?

343 A. Yes, sir.

Q. When he went on further after the adoption of that resolution and said, "We feel that the moneys on hand ought to be divided up, first, to the paying of Mrs. Francis twelve thousand dollars, to paying Mr. Nielsen, and the balance of the stockholders; they ought to have the use of this money and leave it to the last payment for the protection of these obligations." Did you understand that he was talking about this money in your hands, as an officer of the corporation and the proceeds of the notes in your hands, you understand that was what he was talking about?

A. Yes, sir.

Q. And when he spoke about it, why didn't you, as president of the corporation, say to Judge Barnes, "This corporation does not owe anything to Mrs. Nielsen or to Mrs. Francis; that has been rescinded. Why didn't you speak about that at that time?"

A. I never gave it a thought.

Q. In other words, having given up voluntarily without any action on the part of the corporation nearly three hundred thousand dollars; the assets of that value you didn't think it of any moment that Judge Barnes should speak about dividing that money among the stockholders; that is correct?

344 A. Yes, sir.

Q. Now, I call your attention further that a very short time after the adoption of this so-called resolution, Mr. Ives, the attorney for Mr. Steinfeld, suggested that they apportion and divide that money. Do you remember that?

Q. No, sir.

Q. And Mr. Ives, at that time as the attorney for Mr. Steinfeld, suggested that the stockholders divide that money and the proceeds of that note in the way suggested by Judge Barnes; do you remember that?

A. I do not.

Q. Did you notice it at the time?

A. No, I did not.

Q. You didn't notice it at that time.

A. Not that I remember.

Q. And you understood, didn't you Mr. Curtis, that when Mr. Ives some one half hour after the adoption of that resolution, spoke to you as follows: "Mr. Curtis, has Mr. Steinfeld turned over to you, as an officer of this company, the sum of sixty thousand dollars in money; Answer: Yes; you have that money; yes; and will
345 now deposit it to the credit of the Silver Bell Copper Company in pursuance of the resolution; yes; you have an order upon the Bank of California for the forty-nine thousand nine hundred and eighty-seven dollars and fifty cents (\$49,987.50); yes; you have it as an officer of the company; yes; to be delivered to you as an officer of this company and signed by Mr. Steinfeld, instructing the Bank of California to deliver it to you; yes; as an officer of this company; and when you get it, as an officer of the company, you propose to deposit it to the credit of the company, in pursuance of the resolution passed here today; yes."

Now, you understood that to refer to the proceeds of the Silver Bell sale, to the Imperial Copper Company, viz. the balance of the cash, and the two notes which have been previously referred to at this meeting then and it was during that visit that this thing came.

A. Yes.

Q. I believe you stated that there was no suggestion about dividing this money until after the directors' meeting, which was also held on the 26th day of December.

A. Yes.

Q. I want to call your attention to a little recital. You
346 read this resolution that was passed at the directors' meeting on that day, on the 26th day of December?

A. Yes.

Q. You read them before they were adopted?

A. I believe so.

Q. I want to call your attention to a little recital in them, and ask you what you understood that to mean: "And, Whereas, all of the owners of the stock of the said corporation except the said Zeckendorf having been consulted by the directors, and having acquiesced in the foregoing recitations, and in this action about to be taken by the board at this time." What did you understand that recital in

the minutes of the meeting of the board of directors of December 26th, to mean? That he hadn't been consulted about your intended action; what did you mean, when you said he had not been consulted about it, and about your intended action—the resolution of the board of directors of the meeting of December 26th. I want to know what you meant when you recited in there that he had not been consulted and had not acquiesced in it, in what you were about to do; what did you mean by it; can you tell us what you meant?

A. No.

Q. Now, Mr. Curtis, you didn't leave Mr. Ives' office at all
347 after the adjournment of the stockholders' meeting, before you held your directors' meeting?

A. The directors' meeting was held shortly after, right in the same place.

And this set of resolutions which now appears in that book was passed before I left Mr. Ives' office.

Q. And in that resolution, you recited that Mr. Zeckendorf had not been consulted in what you intended to do?

A. Yes, in the contribution.

Q. I will ask you whether or not the following questions as they are read to you were not propounded to you by Colonel Herring, and whether or not the answers were not given, and whether or not at that time, you did not testify as I am about to read?

MR. HERRING:

Q. "Did you ever state to Louis Zeckendorf anything about the purchase of this English group of mines? A. I don't know that I ever did. Q. Are you positive whether you did or did not? A. No.

I don't remember that I ever said anything to him about it. Q. Did you know that he was the senior member of the firm of L. Zeckendorf and Company? A. Yes, sir. Q. Did you know that L.

Zeckendorf and Company were stockholders in the Nielsen
348 Mining and Smelting Company? A. Yes, sir. Q. You were in the employ of L. Zeckendorf and Company as their mining man? A. Yes, sir. Q. Why didn't you give this information to Louis Zeckendorf then? A. I have referred to Nielsen and these English mines very frequently. I had no business with L. Zeckendorf and Company. I was at all times with Mr. Steinfeld and I always reported to Mr. Steinfeld, and never to L. Zeckendorf and Company, nor to Louis Zeckendorf; he never asked me any fact about my private business at any time. Q. You never thought it worth while to present for his consideration these facts to him as the head of this firm or any of the facts relative to the workings of the Nielsen Mining and Smelting Company? A. No, sir. Q. Now, will you tell how it was if you never did present any of these things to Louis Zeckendorf that he brought to your attention the business of the Nielsen Mining and Smelting Company? A. I was working as general manager and superintendent. Q. Then you did talk with Louis Zeckendorf about the mines previously. A. Yes, sir. Q. That is the talk in which you gave him all the information in relation to these matters? A. Well, I might have said some other things,

but they were all of small importance. Q. But you never informed him that Albert Steinfeld had all these English claims in his own name, did you? A. I did not think it was necessary. Mr. 349 Steinfeld could have informed him of that fact himself. Q.

You were the president of this corporation, were you not? A. Yes, sir; but we did not buy mines. Q. Well, you dictated operations after you went back to the Silver Bell mines; did you take ores and flux from the Silver Bell mines to work them for the company? A. Yes, sir."

Now, did you at that time I have referred to, at the trial I have referred to, testify as I have stated here, in response to these questions, and make the answers as are here set out?

A. Yes, sir.

Q. Turning down to the middle of page 52 (Reading) "Didn't you know that it was necessary for the value of the Old Boot to have these English mines in order to make successful operations of the Old Boot? A. I always thought so. Q. Did you ever tell Louis Zeckendorf that? A. I don't know whether I did or not. I don't think I did."

Now, Mr. Curtis, I now direct your attention next to the last question of page 52, and you will consider that I am asking you now, if you did not testify at that time and the questions to be given were not then given. "During the entire time you were working?

A. All the time I was working, yes, sir. Q. In these reports you sent to Louis Zeckendorf, did you ever mention the necessity 350 of getting these English claims? A. I did nothing but send the reports. Q. That was a very important matter to him

(Shows witness a report). Look at this, and state, if you know, who made that report? (Witness examines report). A. Yes, sir; I think that is a copy of what it appears to be. I don't remember, but I think it was in my own handwriting. Q. To Albert Steinfeld?

A. Undoubtedly, yes, sir. Mr. Herring: We ask to have this marked Plaintiff's Exhibit 36. Q. I wish to show you another report which

is marked "Silver Bell Copper Company," a report by J. N. Curtis, of February 15, and I will ask you to state, whether or not, that this is your report. (Shows the witness the paper which the witness examines). A. Yes, sir, I guess the whole thing is mine, or a copy of it. Mr. Herring: We ask to have this paper marked Plaintiff's Exhibit 37. Q. Were not some of these mines that the Imperial

Copper Company bought included in that group of English mines? A. Yes, sir. Q. To whom did you send that report? A. To Albert Steinfeld. Q. About March 14, 1901? A. Yes, sir. Q. That in-

formation contained in there was true to the best of your belief? A. Yes, sir. Q. Submitted to whom, Mr. Witness? A. What do you

mean, sir? Q. I say, submitted to whom? A. It is not signed. Q. It is not signed, I know, but it is sent submitted; to whom was it

submitted? A. It is a copy of a report I have made. Q. 351 Was it true when you made it? A. I think every word of it was true. Q. To whom did you submit the original? A.

It was a report I got up; I don't know whether it was submitted to

anyone or not. Q. You got it up for the company? A. For the company's benefit, of course. Yes, sir."

Now, Mr. Curtis, was the testimony which you gave at that time true?

A. Well, with this exception, that since seeing these letters I wrote to Mr. Zeckendorf, I find I have refreshed my memory to that extent that I did advise him in regard to those Silver Bell mines in the way that I have mentioned them in the letters, and in no other way.

I did not in any conversation at the mines in February, 1901, direct his particular attention to any claim as being claims included in the Silver Bell purchase, excepting in a way, in a general way, saying that we owned them now.

Q. And by saying that we owned them now, that meant by that you indicated to him that the company had bought them, or somebody had bought them, and that they were called the Silver Bell purchase?

A. Albert Steinfeld had bought them and we considered——

Q. What interest had you with Mr. Steinfeld?

352 A. The same as Mr. Zeckendorf, a part of the firm.

Q. What interest had you with Mr. Albert Steinfeld at that time personally and independently of your position as president of the Silver Bell Copper Company?

A. My interest was always with L. Zeckendorf and Company.

Q. What did you mean when you testified last June that you were with Albert Steinfeld and never with L. Zeckendorf and Company?

A. Albert Steinfeld always did the business with me, not Mr. Zeckendorf; that is what I meant and that is all I did mean. Mr. Steinfeld gave me all my instructions.

Q. Now let us refer to that question. (Reads): "Why didn't you give this information to Louis Zeckendorf then?" A. I have referred to Nielsen and these English mines very frequently; I had no business with L. Zeckendorf and Company. I was at all times with Mr. Steinfeld, and I always reported to Mr. Steinfeld and never to L. Zeckendorf and Company, nor to Louis Zeckendorf."

A. I think where it refers there to my business with L. Zeckendorf was erroneous; I think it was L. Zeckendorf and Company.

353 Q. What did you mean when you said: "I was at all times with Albert Steinfeld and never reported to L. Zeckendorf and Company, nor to Louis Zeckendorf?"

A. The L. Zeckendorf and Company is wrong.

I never reported to Louis Zeckendorf because I always received my instructions from Albert Steinfeld, "and Company" there is wrong, because I did represent L. Zeckendorf and Company.

Q. You did not so testify at that time. Let us read: (Reads) "I always reported to Mr. Steinfeld and never to L. Zeckendorf."

A. I think I testified that way, the way you read it last, but they put the words "L. Zeckendorf and Company" on where they should have left it off.

Q. And you think now that you have testified the way you wanted it then?

A. No, I say I think I testified that way then.

I had an interest with Mr. Steinfeld individually in February, 1901, at the Mowry mines and at the Salero mines in the Salero district, Santa Cruz County.

354 . I did not have any other interest at that time other than as president of the Silver Bell Copper Company and as director and stockholder in the Silver Bell Copper Company, with Albert Steinfeld, in the so-called English group of mines.

I went out to the mines with Mr. Steinfeld to see the Nielsens and met them at the Atlas, or Red Rock properties. I don't know as we went out to see them, but saw them at their camp, and while we were there, Mr. Steinfeld, for himself, individually entered into a contract with the Nielsens in the matter in which I have described here.

I came back to Tucson about the 29th day of June, 1900 and called at Mr. Franklin's office and was asked to sign on behalf of the Silver Bell Copper Company that contract with the Nielsens. I read it no doubt and signed it. I don't remember whether Mr. Steinfeld was there or not. Steinfeld undoubtedly requested me to go there. I don't remember how it was, whether I went to Mr. Franklin's office, or Mr. Franklin came down to L. Zeckendorf and Company's office, I don't remember. I knew there had been some talk between Mr. Steinfeld and Mr. Franklin. I cannot say how long it was before.

Q. Didn't you know that before that contract was ever signed that it had been stated to you by Mr. Steinfeld that the Silver Bell Copper Company was *was* going to obligate itself to the Nielsens to pay the Nielsens \$10,000 out of this property, in consideration that they sold their stock?

A. Yes, I think Mr. Franklin told me that.

Q. How long before that contract was drawn up and signed?

A. I don't remember. Some little time though; whether it was a week or two more, I don't remember. I was familiar with the terms of that contract with the Nielsens when it was signed, and I knew, independently from reading the contract, at all times that the contract bound defendants to pay the Nielsens \$10,000 out of the purchase price they might receive from the Old Boot. I didn't understand it at that time Steinfeld had paid them a thousand dollars.

Q. You are pretty good at reading and interpreting contracts; you understand their meaning?

A. Yes, sir.

Q. I now direct your attention to Plaintiff's Exhibit 55 in the Franklin case, being also an exhibit in this case, being a contract between Albert Steinfeld with the Nielsens; and I will ask you to kindly look at that Mr. Curtis, and after reading it, ask you whether it is not plain to you from the reading of it, that the Silver Bell Copper Company agreed to pay \$10,000 out of the proceeds of the sale of its property if it was sold; or \$10,000.00 out of the net working of the mines?

356

A. Yes; but the way I understood this; Steinfeld had to pay that \$10,000.

Q. Anyhow?

A. Yes; he had to pay that \$10,000; that Steinfeld had to pay this \$10,000; that is when the mines were sold, but if it came out of the mine as a profit before that, then it came out of the profits of the mine.

Q. Will you please point to that part of the contract which led you to understand that Mr. Steinfeld and not the corporation, was to pay that out of the proceeds of the sale of the mines? Point to that part of it which indicated to you as president of the Nielsen Mining and Smelting Company that Albert Steinfeld and not the company was agreeing to pay that money?

A. The company could not pay it; they didn't have any money.

Q. I ask you to point to the part of the contract that indicated to you that Steinfeld should pay the money?

A. I always understood it that way.

Q. Said parties of the first part; that is plural?

357 A. Yes, sir.

Q. That said parties of the first part agree to do certain things?

A. Yes, sir.

Q. Now, the said parties of the first part agreed that the Nielsen Mining and Smelting Company shall commence operations in the Silver Bell Mining District, and that would be the company?

A. Yes, sir.

Q. And agreed that if it sells the property to pay out of the proceeds of the company—didn't you understand that it meant the corporation, as well as Mr. Steinfeld?

A. Yes; but the way I construed that; Steinfeld had to pay that money—not, if the company made any money themselves.

Mr. HENRY: In other words, if the property was sold at a loss, and there would not be enough to pay L. Zeckendorf and Company, Mr. Steinfeld would have to pay it.

Mr. MESERVE:

Q. Where is there anything in that contract that led you to think that?

358 A. Albert Steinfeld's guarantee—Albert Steinfeld.

Q. What is there in that contract, put your finger on it?

A. Albert Steinfeld, parties of the first part—

Q. Does it say Albert Steinfeld, party of the first part, or does it say Albert Steinfeld and the Nielsen Mining and Smelting Company?

Please put your finger on that part of the contract that at that time led you to believe—not whether it was rightly or wrongly—but that led you to believe that Mr. Steinfeld and not the corporation was to pay that \$10,000 in the event of a sale. Put your finger on it?

A. I understood at the time if the mine didn't make the money,

Steinfeld had to pay it. That mine at that time was in very bad condition.

Mr. HENEY: He is asking the witness to do an impossibility. The witness is not a lawyer. A contract is read from all four corners and you cannot construe any contract by putting your finger on anything.

If he was a lawyer he could answer and say the mine was
359 indebted to L. Zeckendorf and Company \$80,000, and if the mine was sold for less than the indebtedness, Mr. Steinfeld would have to go down in his pocket and pay the \$10,000.

From that time on it didn't occur to me at all that the corporation had any interest in the stock until Mr. Franklin gave Mr. Steinfeld to understand that he was a trustee.

Q. When was the first time that Mr. Franklin made that suggestion with reference to Silver Bell Copper Company's stock?

A. I think in July. I think it was—it might have been in June. It may have been as early as May.

Steinfeld asked me why I signed that stock made out in the name of Albert Steinfeld, trustee. I think along in March or April, just after he came back from San Francisco in 1901. All he asked me was why I signed it; that is all he said about it; why I signed it. He didn't say I ought not to have done it. He didn't ask me that time as president of the corporation to change that and make another certificate. He showed me right at the same time some reading on the back of the certificate—of the stub. That was the first time I heard anything about it and that was early in 1901, when he came back from San Francisco. I don't know what he said about that

handwriting on the back of it. I believe he told me to go up
360 and see Mr. Franklin about it—something about it. I know it was about that time when Mr. Franklin claimed that he

was only holding it as trustee for the company, these Nielsen shares. Mr. Steinfeld told me that he didn't hold them as trustee; he said that it was his money that he paid for it and he claimed that it was his. After calling my attention to the endorsement, he did not ask me to change it, nor to re-write and change the certificate; nothing was said about that.

Q. You have read and identified this letter of May 25, 1901, an exhibit in this case, No. 138, written by you to Mr. Steinfeld; and I will call your attention to a matter on the next to the last page; reading as follows: "If you cannot sell to some good people, why not try to sell 30 per cent. held as trustee to some friends who will always be with you. Sell the 30 per cent. for enough to pay the debt and give us the surplus.

"I wish you would come out yourself and go through the property."

Is that the 30 per cent., the 300 shares of the Nielsen stock?

A. Yes, that is what I was referring to; I sent that letter to Mr Steinfeld.

361 Q. Mr. Curtis, don't you know that you didn't have any talk with Mr. Franklin at all? Don't you know that you

didn't have any talk with Mr. Franklin at all or with Mr. Steinfeld about any claim or trust relation until in June 1901?

A. No; I have given you the date to the best of my knowledge.

Q. Don't you remember that you went to Mr. Franklin and you told him that Mr. Steinfeld was claiming those properties; was claiming that stock; and that was in June 1901; and that he went down to Mr. Steinfeld and that you then spoke of the fact that he was charging interest on the money?

A. The dates I have given you, Mr. Meserve, is the very best of my recollection.

Q. Do you know whether or not such a conversation occurred in July, 1901?

A. Whether such a conversation occurred in July?

Q. Yes. That you went to Mr. Franklin and made a complaint that Mr. Steinfeld was now claiming to own those properties? Did you know that in July, 1901?

A. I don't remember.

362 Q. Had there been any interest paid on that account, that had been rendered by Mr. Steinfeld in May, 1901?

A. May 22, I sent Mr. Steinfeld in two checks.

Q. And if in a conversation with Mr. Franklin, you referred to the fact that he was charging you interest, you referred to these interest checks?

A. There was such a remark made of course, that was the only interest paid.

I don't remember the date of any such conversation. There were many, and I don't remember when it started. I got the date of the interest impressed on me because I referred to the books.

Q. Will you say now, Mr. Curtis, as a matter of independent recollection, that the first conversation that this subject of a trust and claim of trust was discussed was not after the payment of that interest?

A. No, sir. I believe that it was after the payment of that interest. I think it was. I believe it was.

Q. You won't say it was; you are not positive?

A. No, I can't say positive, but I feel positive myself that it was.

Q. Because you found the entry in the book there?

363 A. That helps my memory a great deal.

Q. Don't it help your memory altogether?

A. I don't remember when the first meeting was about it.

Q. And you have now no independent recollection of those dates, except as you know it from the Silver Bell transaction?

A. There was some previous talk about this trusteeship previous to there ever being rendered an account, or any such charge.

Q. How big a map did you have to have out at the mine in February, 1901?

A. In February, 1901, we had practically the same map as you have here right now; the same size, claims and everything the same size. I don't know whether there was any heading on the map; I doubt very much if it said anything. I don't think it said Silver Bell Copper Company. There wasn't anything on that map

which said Imperial, the property of Albert Steinfeld or the Steinfeld purchase. Very likely I made up a map of the group as a whole, while Mr. Steinfeld was in Europe, as one group, including the Old Boot, and the claims that I had located. I won't be sure. I

cannot say when the first map was made putting on the
364 locations that are on this map; I could not say. This map as it is now made up, as a map of one entire group and one entire property was before February, 1901. I feel sure of that, and Santee made the survey. The Silver Bell Copper Company paid him for the survey. I got him to go out. Very likely I consulted with Mr. Steinfeld about such things as that. I don't think he paid for any part of the survey. I think I paid it all. When I say I, I mean the Silver Bell Copper Company.

I said that Mr. Hill had said our property was too small; and then I was giving my advice to Mr. Steinfeld or L. Zeckendorf and Company, that I considered it imperative to buy the adjoining mines. I made the remark that L. Zeckendorf and Company, or you, that meant Albert Steinfeld, should buy these adjoining mines.

I didn't say the Silver Bell Copper Company, because they had no money. I might just as well have said J. N. Curtis; I didn't have any money.

I knew that the Nielsen Mining and Smelting Company had obligated itself to pay \$25,000 for the Old Boot in installments of \$2,500, through L. Zeckendorf and Company.

365 Mr. HENEY: There was no such obligation; they had an option on it. Don't let us get confused.

Mr. MESERVE: They had an option, but the very moment they made the first payment it became a trade.

L. Zeckendorf and Company paid it; charged it up to the Silver Bell Copper Company. I said to Mr. Steinfeld, if he could get that property then it would strengthen the Old Boot property as a whole; it would be worth a great deal more money than separately. I told him that the chances were that the Old Boot would run into the Prospector; at that time I had an idea that the Old Boot would run into the Mountain View.

I didn't have at that time a doubt as to whether or not the ore body in the Old Boot mine apexed in the Mountain View.

We had a strong apex on the Old Boot. There was a question whether this apex might slip like the suits up in Montana in the Heinze suits, and that crowd. I don't know what they are up there; I have never seen any, but I have read about them, and I judge there was some similar trouble liable to occur at any time. The

Mountain View is not on this map. It laps over the junction,
366 the Emerald, a part of this corner in here of the Old Boot, on the Prospector. I was afraid that there might be a split in that apex, and the result would be a question as to who owned the ore in the Old Boot mine. I communicated that fact to Mr. Steinfeld and before he negotiated with Francis and Volkert.

Mr. Steinfeld ordered the mine shut down in the spring of 1900. I think it was in December 1900; no, in December, 1899;

I think it was then we started up in September, 1900; now that is the only shut down. The shut down was either in December, 1899, or January 1900. At that time when it was shut down, Mr. Steinfeld had been advised of everything that I knew with reference to the ore bodies. I communicated that to him as president of the Silver Bell Copper Company and he knew that the information which I had obtained I had obtained as the president of the Silver Bell Copper Company. The shut down of the mine was for two reasons, one was the trouble with Nielsen and the other was the running in debt under Nielsen's management; the thing was running into debt like the mischief.

We opened up again in September, 1900. Mr. Steinfeld was in San Francisco when I started up. I began to run in September, 1900, and continued to run without cessation until February, 1902.

367 Yes, that is the mine, not the furnace. A great deal of that time, of course, was the development because the furnace was not running for the want of ore. The time we were not running, we put the ore on the dump; afterwards we hauled it down to the furnace and run it through the furnace; and that operation in the Old Boot mine continued right along then up to the shut down of February, 1902. I kept track of that operation.

Q. I call your attention to a letter dated Silver Bell, District, Sunday, p. m. June 9, 1901, which you have already identified as having been written by you to Mr. Steinfeld, which is marked Plaintiff's Exhibit "139," and I call your attention to the following language in that letter: "For my part, I wrote you when in Europe what I thought we had in the Old Boot."

Mr. MESERVE: I am not reading this to Mr. Curtis and I am going to ask his interpretation of it: "For my part I wrote you when in Europe what I thought we had in the Old Boot. Today, thank God, I have proved every word I wrote to you ten times over; and I have, I think, a good practical man to prove I am right, Mr. Bonsall; yes, we have a big and a good mine. From the 228 feet to and above I would not ask less than \$750,000 for the property."

368 Now, I will ask you what you meant in this letter, when you say you wrote him when he was in Europe ten times over about the Old Boot. Does that refresh your memory as to what your letter was that you wrote him when he was in Europe.

A. Not yet. I am reading this letter through. The way the thing reads is like this: I proved every word I wrote you ten times over; that is the work had been proved ten times over what I reported.

I would not ask less than \$750,000 for the property. I spoke of the Old Boot. Certainly, I always spoke of the Old Boot. There was no great amount of development work in the so-called English purchase or English properties before the 10th day of June, 1901. There wasn't much done until later. Nothing was done by me in the way of development before the 10th day of June, 1901, that showed up those properties to any great extent. It was after July.

We opened quite a body of ore on the Yankee. As soon as Steinfeld came back from Europe, we started the furnace up in the early part of 1901.

I could not say how much work I had done on the Yankee before June 10, 1901. There was considerable work done there and considerable ore extracted. An open cut went down probably 20x30, and it was continuous work from that, and it was down quite deep.

The smelter started I think it was January, 1901.

369 The smelter was running I know when Mr. Zeckendorf was there. That was in February, 1901, and it was shut down. Now, I went out in July. A man named Archer was there and I know the furnace was shut down then, and it must have been shut down a month or two previous to July. Now it was running in February, and I can't remember when it was shut down between these two dates.

The only purpose of my mining on the Yankee was to get iron and other ore to use in connection with the smelter, and when I was not running the smelter I was doing mining on the Yankee to get these ores ahead to start up with.

I think we got some iron off the Page. I don't remember though how clearly it was that we got that in the spring of 1901, we may have got some carbonate ore off the Southern Beauty.

I want to call your attention to a letter dated June 10, 1901, marked Plaintiff's Exhibit 140 in this case; and I want to call your attention to this language: "I would be careful in regard to selling this place; don't let anyone have a hold on it unless they put up, and mean business. I would not ask less than \$750,000. I feel sure that there will be dozens after it and a few of the dozens who could buy; so I say, be careful; what you saw is nothing to what we have today."

370 What did you mean by that; what you had in the Old Boot?

A. I think that this language is entirely Old Boot—commencing two hundred and twenty-eight—on the one hundred foot level.

Q. So that this letter refers entirely to the Old Boot?

A. Yes; this letter dated 10th day of June, 1901, fixing the purchase price at \$750,000.

Q. Where did you understand the Clarence and Identical mines to be, when you had that talk with the Nielsens, you and Mr. Steinfeld?

A. The Clarence was up, as I had shown you on the map and the Identical was down in the Young American group. At that time I knew pretty near where it was. I say, they had been jumping other claims, that is what we heard, and at that time I understood that fact, and that was the reason why we insisted or required them to put in their deed, a conveyance of any other mining claims or properties they might have out there. So, we would have no further trouble with them. At that time I and Mr. Steinfeld talked together about the fact that the Nielsens had been jumping the different claims of this group; they interfered with some of the Old

371 Boot and some of the Silver Bell Copper Company's claims and some English claims.

I advised Mr. Steinfeld of this fact at the time *time* the deed was secured, to secure everything in the district.

Prior to the 20th day of May, 1903, and prior to the time that Mr. Steinfeld gave that option to Mr. Beaton, there had been no discussion of any kind or character, between me and Mr. Steinfeld, as to any division of that purchase price.

Prior to the meeting of May 13th, 1903, when Mr. Steinfeld reported the Beaton option to the board of directors of the Silver Bell Copper Company, there had been no discussion or suggestion of a division of the purchase price.

I got to Tucson about the 23rd of December, 1903, from New York. I went out from here to the Mowry mine. I was opening and working the Mowry mine, starting them up.

Q. What was the reason for holding a meeting of the directors on the same day that you had held the stockholders' meeting of December 26th, 1903, or was there any reason?

A. Well, for my part, I wanted to get away and get out 372 of the mines, it was important that I should get there December 26th, that is the time.

Q. Now, you testified in the Franklin case: "I never reported to Louis Zeckendorf—referring to those mines out there. Did you believe that was true at the time you so testified?"

A. I thought at that time it was. I have refreshed my memory in regard to it.

I read and heard read all the letters between Louis Zeckendorf and Al-

The letters these gentlemen have brought here in this case I have read and heard read all the letters between Louis Zeckendorf and Albert Steinfeld and my letters to Louis Zeckendorf, and have examined these different books of L. Zeckendorf and Company and all of the Silver Bell Copper Company; that has refreshed my memory in regard to the circumstances that these things relate to. I think the testimony I have given at this trial, where it differs from what I gave in the Franklin trial is correct.

My feeling toward Louis Zeckendorf at the time did not have any influence in causing me to vote for the resolution of the board of directors, entered into on January 16th, 1904, with Albert Steinfeld, whereby he was to have one-half of the net proceeds of the sale of that group of mines, at the directors' meeting.

I am satisfied that the two checks for interest—that both 373 the checks were returned. Steinfeld sent back those two checks.

Q. Now, when you started up the Old Boot mine in September, 1900—were you out there when it started up in 1900?

— There was no ore in sight in the mine in September 1900. When we shut down in February, 1902, the price of copper was about 10½ or 11 cents.

We could not smelt the ores there with the plant we then had, at a profit. There was bullion in transit at the time we shut down.

On December 31st, or January 1st, the bullion in transit I wrote off on the books \$26,000 loss on that bullion. What we did get for the bullion about balanced what we were carrying it at.

Q. Now, in your opinion could those mines have been worked

at a profit at that time, or could the Old Boot property have been worked at a profit at that time?

A. It would have required a larger plant.

Q. In your opinion, what expenditure was necessary in order to put up the kind of a plant that was necessary to work property at a profit then?

A. Well, have to have new hoisting works, new smelter,
374 a half million dollars, in round figures.

Q. Now in these several letters of June 9th, 1901, June 10th, 1901, when you spoke of not selling the Old Boot for less than seven hundred and fifty thousand dollars, what were you referring to? What did you mean to fix the price on?

A. On the group—everything.

At the time that Steinfeld was having a talk with the Nielsens with regard to the stock out there, I did not entertain any fear of the jumpers' titles of the Nielsens, that overlapped the Silver Bell properties. Zeckendorf told me several times that the debt was too great; it had to be reduced.

Mr. IVES:

Q. In the direct examination this morning, I understood you to testify that you didn't see the writing on the back of the stub in the stock book at the time Mr. Steinfeld showed you the certificate, and asked you why you signed it?

A. That is right.

Q. On the cross examination this afternoon I understood you to say that at the time he showed you the writing on the back of the stub.

375 By Mr. HENNEY: I didn't understand him to say that. I understood that was at the time Louis Zeckendorf showed him the certificate.

Q. When did you see the writing on the back of the stub?

A. When Mr. Steinfeld called it to my attention later on.

Recross-examination.

Mr. MESERVE: I want to call your attention to the cash account of L. Zeckendorf and Company which is here in evidence; the cash account of May, 1901. You have testified that Mr. Steinfeld returned to you those checks.

A. Yes, to the best of my recollection.

I am a pretty good bookkeeper.

Q. I will call your attention to the cash book of L. Zeckendorf & Co., and to page 201 on that cash book which is in evidence; to page 221 of that book, May 28, Silver Bell Copper Company, check 928, \$950, 929, \$200., those are the two checks for the interest which you gave Mr. Steinfeld?

A. Yes.

Q. And that entry in this cash book of L. Zeckendorf &
376 Co., shows that on that day they paid them?

A. I don't think it proves anything of the kind.

Q. What does it prove?

A. That they were received.

Q. These checks were drawn on L. Zeckendorf and Company. These were checks, a printed form drawn by the Silver Bell Copper Company on L. Zeckendorf and Company.

And that shows that on that date, the amount of those two checks by L. Zeckendorf & Co., was charged against the Silver Bell Copper Company. We never received that amount. It is charged to the Silver Bell Copper Company in their statement to us.

I have said that I believe the checks were returned to me and I still believe it.

Q. Were they returned to you marked "Paid" and endorsed by Albert Steinfeld, trustee?

A. Undoubtedly they were returned endorsed by his name.

Q. And stamped "Paid by L. Zeckendorf & Co." on May 19, 1901?

A. I don't remember.

Q. Well, now as a book-keeper of experience in book-
377 keeping, I will ask you to interpret this account here; if they don't show that that check was paid on that date?

A. That is what it would infer; yes. What they did though I don't know.

— If that check was ever returned to you, it was after that date. After it had gone through the books of L. Zeckendorf & Co. in that way.

— I don't know when it was returned, whether there was any endorsement on it.

MR. MESERVE:

Q. Don't you know that every check you ever drew on L. Zeckendorf & Co., came back?

A. Yes; but not in that same way, this didn't come back in the cash statement.

I am simply going to my memory for it. I had a little book in which I kept track of the checks which were returned to me by L. Zeckendorf & Co., which were paid. I could not find that little book. That would not show whether that check came back charged against me; that we had issued it, and that it had come back in some channel, paid or unpaid. When I drew a check on L. Zeckendorf & Co., it was just the same as on the bank. And when the
378 check came back through L. Zeckendorf & Co., it was just the same as if it had come through the bank.

On these pass books the first deposit made in any of these banks was on the 20th day of January, 1904. The first deposit made by me as an officer of the Silver Bell Copper Company in either the Consolidated National Bank or the Arizona National Bank, or in any bank was not on the 20th day of January, 1904. The first one was on the 4th day of January; the amount was the amount of the Bank of California check; forty-nine thousand dollars and something.

Q. Where did you deposit the \$18,117 that Albert Steinfeld gave you?

A. The whole of that money was deposited in the safe deposit box.

Q. What form was that payment in?

A. The eighteen thousand dollars was a certificate of deposit on L. Zeckendorf & Co. in favor of the Silver Bell Copper Company and the \$117 was a check of Steinfeld's on the Arizona National Bank I think, or on one of the banks.

Q. What date was that check?

A. Check for \$117. I am almost sure that both are December 26th.

Q. When did you deposit that \$18,000 and that \$117?

379 A. That whole thing then was deposited with the checks and the certificate of deposit on the Phoenix Bank; and the checks, what checks I got from the Phoenix Bank; it was all deposited on the 16th, I think.

Mr. MESERVE:

Q. Why, Mr. Curtis, if you had all those things prior to January 1st, 1904, didn't you deposit them in the bank as the resolution of the stockholders directed you to do?

A. Well, I don't know why I did it or why I didn't do it, I know I was in a hurry to get out of town. I went right over and deposited them in the safe deposit box and left them there, and they were left there until the 16th of January I think, before I deposited them.

Q. Then you put the money in the bank about the time you had this meeting on the 16th of January?

A. No, the 4th of January was the first money that went into the bank. That was when the Bank of California sent the money. I didn't put that in the safe deposit box.

Q. Why didn't you go out and get the balance? Don't you know you didn't have it?

380 A. We did have it, I had it in the box.

Q. Were these time certificates?

A. What do you mean by that?

Q. Were not all of these certificates time certificates, not due until January 4, 1904, and isn't that you did not deposit them?

A. No, sir. They were nothing of the kind, they were simply deposited when I put them into the bank. That's all there was to it.

Q. Have you got written statements that show just exactly what you had in the safe deposit box and when you deposited it?

A. At that time?

Q. Yes.

A. Yes. I have got a memorandum book in my pocket.

Q. Produce it—

A. At least I think I have.

Mr. IVES: Eighteen thousand dollars plus one-half of the Franklin garnishment.

381 A. There you are.

Mr. HENEY: Show it to Mr. Meserve so he will know how to question you.

A. Here is the whole business. (Reads from his book): "December, in safe deposit, Tucson, A. T. for account Silver Bell Copper Company.

Certificate of deposit on L. Z. & Co. Tucson, \$18,000.

Check A. S. on Consolidated N. Bank, Tucson, \$117.

I have got down certificates of deposit, Phoenix National Bank, \$19,349, November 24th, \$25,000.

Q. Then if Mr. Steinfeld gave you a check for \$43,750 for one half of the \$51,000 and \$18,000, and that \$117 wasn't the \$18,117 returned?

Mr. Ives just stated the fact to be that Mr. Steinfeld gave you a check for \$43,750 that that forty-three thousand constituted the amount—was the \$25,750, one half of the Franklin garnishment money, plus \$18,000 of the original Steinfeld purchase price so-called, is that correct?

382 Mr. IVES: I did not state that quite. That is not correct.

Mr. Curtis received from Mr. Steinfeld on or about the 26th of December \$117 by check, and a certificate of deposit in favor of the Silver Bell Copper Company on L. Zeckendorf & Co. for eighteen thousand dollars. On the latter day whatever it *may* be, either the 15th or 20th of January, I don't know what, Mr. Steinfeld took up that \$18,000 certificate of deposit which Mr. Curtis had held and gave Mr. Curtis in lieu thereof the order of the Silver Bell Copper Company a check for \$43,750 being \$18,000 in lieu of certificate of deposit which was then surrendered by Mr. Curtis to him, and the balance being one half of the garnishment money which Franklin had garnished. That is the precise transaction.

Mr. MESERVE (to Mr. Steinfeld): Now, Mr. Steinfeld, will you kindly bring up tomorrow morning the certificate of deposit book, out of which those certificates were written and that original certificate of deposit for \$18,000 and your original check book.

Mr. STEINFELD:

A. Yes, sir.

Mr. MESERVE (to the witness):

383 Q. That statement now made by Mr. Ives, is that the way you understand it now?

A. Yes, sir.

Q. And \$117 check was returned?

A. No, I kept that. I returned the certificate is all.

Q. What did you do with it?

A. Put it in the bank.

Q. Kindly take that statement of the Arizona National Bank and the statement of the Consolidated National Bank and show us where it got in there?

A. In the first deposit.

Q. In what bank?

A. In the Arizona National Bank. One hundred and three thousand eight hundred and sixty-seven dollars (\$103,867). The word "deposit" \$49,987.50.

Q. What was that made up of?

A. That was the first from the Bank of California.

Q. Now, on January 16th, they deposited \$103,867.

A. Yes, sir.

384 Q. That was the proceeds of a note?

A. That was the Phoenix National Bank certificates.

Q. Wasn't that the proceeds of a promissory note for \$103,000?

A. No, it was made up of these items:

Phoenix National Bank:

Certificates of Deposit.....	\$25,000.00
	10,000.00
	5,000.00
Check A. S. (Albert Steinfeld).....	1,500.00
Bank of California.....	8,500.00
Check on Arizona National.....	53,867.00

That made up the.....\$103,867.00

Q. Where did the \$117 come in?

A. It came in to make up that amount——

Q. Will you be kind enough to go to the Arizona National Bank tomorrow morning, and ask them to bring that deposit tag with them in here, the deposit tag of the Silver Bell Copper Company of January 16th, 1904, both the deposit tags and all of the accounts of the Silver Bell Copper Company.

And, I will ask Mr. Tenney if he will be kind enough to bring his deposit slips for these deposits of the Silver Bell Copper Company, if you please.

385 Q. Was that the name in which you kept the accounts?

A. Yes, sir; the Silver Bell Copper Company, J. N. Curtis, treasurer.

Albert Steinfeld.

ALBERT STEINFELD called as a witness in his own behalf, testified as follows:

Direct examination.

By Mr. Ives:

I negotiated the purchase of the Francis and Volkert claims through Judge Wright, late Judge Wright, and had several conferences with Mrs. Francis, the widow of John Francis, and also with Mr. Volkert which resulted in my purchasing their titles for \$2,500 in cash; \$12,500 to be paid on or before a certain date, I think November, 1903, or at any time prior to that provided I sold these properties.

I signed the paper in evidence in which I obligated myself to pay \$12,500.

Prior to the acquisition of the Francis and Volkert titles, I had discussed with Mr. Zeckendorf in a general way, the advisability of acquiring these adjoining claims, and had written him to that effect quite a number of times.

386 In the conversations I had with Mr. Zeckendorf with respect to buying these claims, he didn't seem to be particular.

During my connection with this Nielsen Mining and Smelting Company I very frequently had conversations with Mr. Zeckendorf about the indebtedness of the company to the firm. He was very much alarmed and very much worried about the large amount of indebtedness and wanted to have it reduced, wanted to get out of it.

After acquiring the Francis and Volkert titles I purchased the Nielsen stock, the 300 shares of stock, which has been talked about in evidence here. I paid for the Francis and Volkert titles twenty-five hundred dollars in cash and agreed to pay \$12,500 more; that was my own money.

I met the Niensens at their camp; the Atlas and Red Rock camp, sometime the latter part of June, while I was out at the Silver Bell camp and discussed there with them—I did not go there particularly for that purpose, but happened to pass by there and it led up to a negotiation and finally ended in my buying their stock. The chief purpose of that purchase which I made was to secure their stock. I wanted to secure their stock, to get them out of the
387 way; they were a disturbing element; I wanted to get them out of the way.

Q. In making this purchase did you have more regard for the value of the stock, or for getting them out of the corporation?

A. I wanted to get them out of the corporation entirely. I wanted to get rid of the Niensens. They were disturbing elements; they were making trouble all the time.

Prior to that I did not have any conversation with Curtis, or any other officer or anyone connected with the Nielsen Mining and Smelting Company with respect to acquiring the stock for the company. None whatever. This two thousand dollars was my own money, not Zeckendorf & Co's. money, my own personal money. Previously I made a great many efforts to acquire the English title to the claims you had bought from Francis and Volkert, extending over possibly a year, over a year, and I had not met with any success. I had failed.

I realized from the start as we became identified with the mines that it was necessary; that it would add great value to the property by acquiring the adjacent property to it, even before I knew of any possible conflict of ore bodies, one running into the other. I have had previous experience in such matters.

388 I was connected with a large sale there of the Ray Copper mines where we found that condition; also with the Copper Queen transaction from its inception; and I knew of other cases. That is one of the first conditions that is necessary to acquire the adjacent properties, anything of value in a copper property of this kind. A single mine is of very little value except in connection with others.

I went to Europe in the fall of 1900, in September. I was interested in the Ray Copper Mines shares; I expected to dispose of them and also to acquire these properties. I did not go to Europe as a pleasure trip. I had previously intended to go on a pleasure trip and I had abandoned that trip for reasons personal to myself and family.

And when I went to Europe, I went directly on business. When I first arrived in Europe, I made efforts to purchase the English titles to these adjoining claims. It was sometime in September. I went direct to London. When I arrived there, I started to negotiate for the property immediately. I believe I was there about three weeks in London in the first place, and I could not meet all the principals of the parties; it took sometime and then I left the matter in the hands of an attorney and then I came back to London. I left London and came back again; and then when I came back, I concluded the negotiations; they were concluded in the early
389 part of November if I remember right, just before I sailed to come back to this country. I obtained a deed for the property. There was another deed to be executed by Herbert B. Tenney to that property. It was in London and I brought that back with me. After I came back from London, Mr. Tenney executed it. I paid all the consideration over in London. The money which I expended in Europe was all my personal money, all of it. And the money I paid for the acquisition of these titles was all of it my own personal money.

Previous to my going to Europe or while I was there I did not have any communication with Mr. Curtis, or any officer of the Silver Bell Copper Company, or its attorney, asking me to advance any money for the purpose of purchasing it for the company.

Q. What did you purchase these properties with your own money instead of with the money of L. Zeckendorf & Co.?

A. Under the articles of co-partnership agreement, I could not buy them for that.

I thought I didn't have the power. The reason I didn't purchase them for the Silver Bell Copper Company was because they had no money; they were already very largely in debt to L. Zeckendorf & Company. On my return from London to New
390 York I met Mr. Zeckendorf in New York.

I had conversation with him with respect to the purchase of these properties. The question came up whether I had purchased the properties; just in a general way. I told him I had purchased the properties. I did not tell him with whose money I had paid for them. I just told him I had purchased them. I told him how much I had paid for them, and what I told him was the correct amount. At that time Mr. Zeckendorf didn't say anything. He expected to be out here very shortly after that, and he did come out.

I came back to Tucson sometime in December, and I left again sometime in January. I went to San Francisco; my family was then in San Francisco. While I was here in January, before I went to San Francisco, I had conversation with Mr. Zeckendorf with respect to the three hundred shares of stock for these English proper-

ties I had purchased. We talked about the Nielsen stock. He asked me about the Nielsen stock, and I told him I had purchased it. He asked me where it was, and I handed him the certificate; I had it amongst my own papers.

I showed him the contract under which I had purchased it.

Mr. Zeckendorf wanted to know further particulars about
391 it, and saw Mr. Nielsen and so on, and also Mr. Franklin, if I remember right; and I don't know particularly what happened there.

I did not have any further conversation with him about it after I gave it to him. The certificate was kept by me, amongst my own personal papers; the stock book of the Nielsen Mining and Smelting Company and the minute book were kept in the safe of L. Zeckendorf & Co.

Mr. Zeckendorf went with me when I got this certificate of stock from among my personal papers.

I heard Mr. Zeckendorf's testimony.

At that conversation with Mr. Zeckendorf I did not tell him I had bought these three hundred shares of stock for the Nielsen Mining and Smelting Company. I told him I had bought it for myself, and bought in accordance with that contract, and I gave him the contract.

Mr. Zeckendorf asked me how I bought it, why I bought, or how I bought it, something to that effect. And I told him I bought it for myself. He asked me, why don't you charge that to the Silver Bell Copper Company, and I told him the Silver Bell Copper Company had no money to pay for it; and then he made that remark.

That is very considerate of you, or something of that kind.
392 He did not offer to pay me the money or any part of it.

He did not suggest that I get the money back from the firm of L. Zeckendorf and Company, or any part of it. At that time I attached very little value to this three hundred shares of stock.

It is my habit—I keep private books of my private business affairs as distinct from the affairs of the firm of L. Zeckendorf and Company. I kept such books at that time. It was my custom to make entries of my personal investments and personal business affairs in such books. At or about the time that I had made this purchase from Francis and Volkert, and from Nielsen, and from the English people, I made entries of such transactions in my personal book. That is the book in which, at that time, I kept the account of my personal affairs. (Book handed to witness.) It is a ledger, my private ledger. There is an entry in that book with respect to these three purchases, the Francis and Volkert, the Nielsen and the English.

Q. Will you explain the general system in which you kept your personal affairs in that book?

A. This is my private ledger. Under the letters, a, b, c, and so on under which I kept private accounts with private debtors, and accounts which I have of different kinds.

393 I mean loans.

Q. Under what heading did you keep them?

A. They are under the letters; under the names of individual debtors.

Then I have one segregation here, one separate segregation under the head of investments, in which I carry all items which are of an investment character.

I have made a loan to the Nielsen Mining and Smelting Company previous to this transaction of two thousand dollars, for the purpose of paying for two smelters, bought from Gardner, Worthen & Goss. I made an entry of it at that time in that book. That is under the letter "N," Nielsen Mining and Smelting Company; that is under "N." The entries with respect to the Francis and Volkert titles, the three hundred shares and the English titles were under the list "Investments."

Q. Now, will you please turn to the entries of all four of those transactions, first turn to the Nielsen Mining and Smelting Company, \$2,000 loan?

That is on page 161 of my private ledger, Nielsen Mining and Smelting Company; the entries on that date were made on June 17th, 1899, at the top of page 161. This is the handwriting of Mr. Donau, who was keeping my private books at the time.

394 Mr. IVES: We offer in evidence that entry in that book.

Mr. HENEY: We will offer the book in evidence.

The book was received in evidence and marked "Defendants' Exhibit "NN."

Mr. HENEY: Now, with your permission I shall read into the record from page 161.

Mr. MESERVE: I have no objection to that.

Mr. IVES: This entry at the top of page 161 is under the heading "N," at the beginning of the N, and all of the entries on page 161 are entries commencing with the letter N.

A. Yes, sir.

Q. The debtor's name?

A. Yes, sir.

395 Mr. IVES: (Reads from the book.) Now this entry 1899, June 17:

Nielsen M. & S. Co., Note 1 day 1 per cent.....	\$2,000.00
Interest on December 17, 1899.....	120.00
January 26th, 1900, by cash.....	2,000.00
Interest to date,	

That account appears closed on the books; it is closed.

Q. Now turn to the heading under "Investments." That amount was the loan you made to the Nielsen Mining and Smelting Company, to make that purchase of that smelter?

A. Yes, sir; the heading at the top of page 110, "Investment I."

Q. Now, Mr. Steinfeld, looking over the entries on page 110 and 111 under Investments, state whether or not they are investments of concerns which begin with any other letter other than the letter "I?"

A. Yes, all the letters.

Q. Where on this book appears the entry of the investment of the Nielsen Mining Company's stock?

396 A. On page 112, at the bottom of the page, under the heading "Investments."

Q. Please read that entry.

A. Nielsen Mining and Smelting Company "N" stock, July 3, 1900, to cash \$2,000.00.

Cash book 34; (That is the cash book folio) to cash \$2,000.00.

Q. Now read the entries on the other side?

A. 1901, May 27th, these are memorandum items:

Interest to May, 3rd, 1901, \$200.00.

Page 64 (That is the page of the cash book).

And then in pencil it is marked, "Void, returned August 22, 1901.

Q. When was that entry of July 3, 1900, to cash \$2,000 put into that book?

A. On that date, July 3, 1900.

Q. Now, May 26th, 1901, when was that put in?

A. May 27th, 1901.

Q. And at the same time, were the words interest?

397 A. They were put in on May 27th, 1901.

Q. The words sixty-four mean what?

A. That is the page of the cash book.

Q. Underneath that is the entry 1903, May 22d?

A. By cash May 22d, \$2,000.

Q. When was that entry made?

A. On May 22d.

Q. After the trade?

A. After the sale.

Q. Was that entry made before or after the signing of the agreement of May 20, 1903, in evidence between yourself and the Silver Bell Copper Company and the Mammoth Copper Company?

A. Made on that date after.

Q. After signing the agreement?

A. After.

Q. Was it made before or after the minutes appearing in the minute book of the Silver Bell Copper Company of May 22, 1903, were written up.

A. After.

398 Q. What are lead pencil words, "Void R. E. P." When were they written there?

A. I cannot say, but I believe they were written on this date August 22, 1901.

Q. In whose handwriting is that?

A. It is my handwriting.

Q. Is it all in your handwriting?

A. Yes, sir. The first entry, cash \$2,000 is in Mr. Donau's handwriting; but all the other entries including the lead pencil are in my handwriting.

Q. At the time or about time you made this lead pencil entry did you send any money to the Nielsen Mining and Smelting Company or to Curtis?

A. I returned them the two checks, which have been referred to there, to the Nielsen Mining and Smelting Company.

I believe I returned the two identical checks. That is the best of my recollection. There is an account here called the Mammoth Copper Company, page 111. That is also under the head of "Investments." No one else had any interest with them with me; these are all my own personal affairs.

Q. Please read the entry under the heading Mammoth Copper Company at the bottom of page 111?

399 A. 1900, May 18th.

Q. Were those entries made upon the day which they appear?

A. Yes, sir; the day on which they appear there.

Q. Mr. Steinfeld, on the right hand column there appears the word "void," returned August 22, 1901; in whose handwriting are those lead pencil marks?

A. That looks like my handwriting, but it is a little indistinct; I guess it is my handwriting.

Q. What did that entry mean?

A. That has reference, as near as I can tell now, and it appears to be the same entry here. There appears to be an ink entry that had been scratched out on page 112, under the head of Nielsen Mining and Smelting Company, in lead pencil.

Q. Now, opposite that lead pencil entry, there appears to be some writing stricken out; what is that entry stricken out?

A. That refers to some interest to May 1, 1901, page 64.

Q. Now, was that stricken out at the same time that the lead pencil entry "void August 22nd, 1901," was made?

400 A. I think it was. That indicates that I returned that check for interest to the Nielsen Mining and Smelting Company, and this account was carried over to page 109.

Now, on page 109, the lead pencil memoranda on page 109 says, under Option to Silver Bell Copper Company, October 15, 1901, for \$15,192.45; then it says, extended to with interest at one per cent.

Q. On the other side is Cash, Silver Bell Copper Company, 1903, \$18,117. What does that entry represent?

A. Shows the contract rescinded.

In addition to the book containing my personal accounts in evidence here, I kept a cash book. I have it here. The entries which are in the ledger are copied from the cash book.

Mr. Ives: I offer this cash book in evidence.

Cash book admitted and marked Defendants' Exhibit "OO."

The next item is on page 10. This is still another regarding my loan to the Nielsen Mining and Smelting Company. This was made at the time we bought the furnaces from Gardner, Worthen
401 & Goss. That entry is in my handwriting. It was put in cash book December 11th, 1899. On page 161 there is an entry. I find that entry on page 14 of the cash book.

Q. Under what date in the cash book?

A. January 26th, 1900.

Nielsen Mining and Smelting Company, by cash, \$2,000; there is \$200 there; that is \$200 interest. These entries are in the handwriting of Mr. Donau, he is my brother-in-law.

I turn to page 29 of the book there in my cash book; I find an entry there with respect to the Francis and Volkert sale in my cash book; May 18th, Investment, Julius Volkert. That was sometime between May 16th, and May 25th of 1900. The entry in my cash book is Investment, Julius Volkert, \$1875. That entry is in Donau's handwriting; that entry was made on May 18th. The next one is on page 32; it is \$15 to the Star Publishing Company; on page 33 I find an entry June 11, 1900, Star Publishing Company \$15. That is the same entry as in my ledger on page 35; I find an entry there under 1900, July 27th, Mammoth Copper Company, \$3,665.63 and underneath that 750 pounds, G. N. Ex. Co.; the date

of that previous entry is the 27th, and of the one right after
402 that is the 28th; those entries are in the handwriting of Mr. Donau and were made on those dates; the next entry, that is page 41 of my cash book, under date of August 12th, that is the date we made out the check and sent it there. That was after I went to Europe. It was in connection with a proposed option that I supposed I had with Mr. Hill.

He represented, or claimed to have an option from the London owners; they had had an option, but it had expired. When I got over there I found out that it had expired.

I closed the deal in England; the money was still there and I used it then. This memorandum of October 4th, on page 41 of my cash book is Mrs. Francis \$676.75.

The handwriting is that of Mr. Donau's. It was paid on account of the Francis heirs, a part of the title was in the minor heirs; it went through the Probate Court. I left that money behind to be paid.

The next is in the cash book on page 43, November 24th, 1900, \$485 a draft on London; that was for some expenses; I think it was an attorney's fee. An English attorney employed when I went there to attend to this business. An attorney I employed there.

On page 43, there is an entry of November 24th, \$15 for
403 recording; that was for recording the deeds and other papers.

On page 51, there is another entry, \$104.

There is an entry 1901, January 14th, it is in the cash book, the Mammoth Copper Company, \$104. \$100 of that went to Judge Wright and \$4 was for recording. The entry was made in the cash book on the 14th day of January, 1900.

March 30th, that is the Mammoth Copper Company.

On March 31st, there is the European trip; that entry is not in my own handwriting. That is \$2668.51; that was put in on March 31st. Mr. Donau put that in after I got home. It is on page 64.

On page 64 of my cash book, 1901, May 27th, there is a Mammoth Copper Company entry, interest May 1st, \$950.17. That is my own handwriting. It was made on that date.

That is all—no, there is the mines and the Niensens—that is here.

On page 34 of my cash book, July 3rd; the entry is "Investment," Nielsen Mining and Smelting Company's stock, \$2,000. That is the handwriting of Mr. Donau. I instructed Mr. Donau to make that entry, and he made it on that date.

404 And another right preceding that, that was at the beginning of that month. That is the first entry in July. The next entry is this one you see on page 64.

1901, May 27th, \$200. That is a \$200 credit; that was one of the interest credit checks paid to me; the entry is Nielsen stock; that was the interest to May 1st.

The next entry is on page 128, 1903, May 21st, Nielsen Mining and Smelting Company, \$2,000. That is the entry on May 23rd, 1903, after the purchase money was made \$2,000.

I turn to the cash book of L. Zeckendorf and Company that was in 1901. I have that.

In the first place there is a charge here on page 221, which I presume are the two checks, the checks 928 for \$950.17 and check No. 929 for \$200. That is a charge to the Silver Bell Copper Company.

In the same book there is another entry—on August 22; there is a credit to the Silver Bell Copper Company with the charge to A. S., special checks of \$528; that refers to the same identical check, making a total of \$1150.17.

In other words, the Silver Bell Copper Company was 405 charged by L. Zeckendorf and Company on May 28th, 1901, with two checks of \$950 and \$200 respectively.

And on August 22nd, 1901, the Silver Bell Copper Company was credited with the same checks, charging them to this special account.

Why, I would infer from this entry here, that these identical checks were credited back again, otherwise they would not make these notations here giving the two amounts.

In other words, if I had cashed these checks and then had drawn a check in favor of L. Zeckendorf and Company on August 22nd, I would have drawn one check for \$1150.17. My recollection as to that is that I returned the checks themselves.

From the time that I received them in May to the time I sent them back in August I think I held them; that is my best recollection.

Q. Now, Mr. Steinfeld, before we offer this book, I forgot exactly where we were, I misstated I think that you had a conversation with Mr. Curtis sometime after your return from San Francisco, in which you asked him how it happened that he issued that certificate to you as Albert Steinfeld, as trustee. Do you remember that conversation?

A. Yes, sir; I do.

406 Q. State when you first saw this certificate in the name of Albert Steinfeld, trustee, for the 300 shares of stock.

A. I cannot tell exactly what time it was; to the best of my recollection it was sometime in either March or April, 1901, on my return from San Francisco.

I went to San Francisco in January. I came back from San Francisco in March. I noticed this certificate then. It was in the

book. I asked Curtis how he came to sign that certificate. He said that Mr. Zeckendorf requested him to do so and had surrendered that certificate. I told him he had no right to sign it that way. He said that he understood that I held it as the trustee for L. Zeckendorf and Company. At the time that certificate was issued Mr. Zeckendorf did not come to me and show me that certificate. I never saw it. He did not show it to me before I went to San Francisco. I never saw any writing on the back of the stub as it now appears on the stub book until Mr. Curtis showed it to me, and then I sent it to Mr. Franklin. At that time I had conversation with Mr. Curtis about the English group of mines which I had purchased. I told Mr. Curtis that Mr. Franklin had claimed in a conversation prior to that that I was a trustee and that I could not hold these properties in my own name, that I would be held as a trustee for this company. The first conversation I had with him was
407 shortly after my return from Europe some time in December, 1900. I sent for Mr. Franklin and I showed him that certificate and I called his particular attention to the lettering on the back of it, and Mr. Franklin informed me that under this contract I had entered into with the Nielsen Mining and Smelting Company that I was a trustee of that stock and that it belonged to this company. He had already informed me that I was a trustee for the purchase of these properties and these titles of Volkert and Francis and the English titles.

Q. I want to call your attention to a letter which is in evidence which you wrote to Mr. Curtis of date May 19th, 1901 (Showing witness letter book).

Counsel reads letter.

Q. This letter bears date May 19th, 1901. Now, with that letter in your mind can you refresh your memory about the date you had that conversation with Mr. Curtis with respect to the certificate of stock in your name as Albert Steinfeld, trustee, which you found when you returned home from San Francisco?

A. I think it was shortly prior to that; I think in that conversation Mr. Franklin claimed that I was a trustee.

After I had this talk with Mr. Franklin in which he
408 claimed that I was trustee, I believed him. He was my attorney, and I believed that whatever he stated to me was correct. I never had any other attorney. I did not consult any other attorney after May 20th, 1903; I had no other attorney but Mr. Franklin until after Mr. Franklin brought this suit against me. After Mr. Franklin told me that I was a trustee my purpose then in writing this letter was that if I was a trustee, there should be a record kept of it and I instructed Mr. Curtis to make an entry on his books in conformity with that. I expected them to pay at least the interest on the money I had advanced if I was a trustee.

Q. Mr. Steinfeld, I again call your attention to the words of that letter in which you say you would see Mr. Franklin as to how the entry ought to be made. After writing this letter did you have any further talk with Mr. Franklin?

A. Yes, sir; in fact when I got these checks for the interest I had a talk with Mr. Franklin and he said as to that I could not do it in that way.

Q. Could not do what?

A. I could not get the interest; that was not the way to do it.

Q. Did he give you any reason for that?

409 A. Yes, sir; he told me that I had accepted this responsibility for the company as to this property, but that I was not a trustee in that light; that I had to fix it up in some other way, and that he would prepare some paper which would cover the matter in question and I remember that we had several conversations about that time and he drew up this paper; these conversations finally resulted in drawing up that paper. This is in evidence here and dated July 15th, 1901. That is the proposition so-called.

Referring to page 24 of the minute book of the Silver Bell Copper Company, First Annual Meeting of the Stockholders, I was present at that meeting. The following stockholders representing the following shares of stock were present. Then follows the names of the stockholders and the stock they represented. There was a total of 1,000 shares. These minutes were not written up when I was present at the meeting, but I was present at the stockholders' meeting. At that time nothing was said about my holding stock as trustee. I left a few days after this meeting. The minutes were written up after the meeting. As a matter of fact, I did not vote the 300 shares of stock at that meeting. The reason I sent the check back for the interest was in the first place, Mr. Franklin informed me that I

410 could not accept any interest; that it had already been incorporated in that offer of mine of July 15th. Mr. Franklin drew that offer. I did not read it closely before I signed it. I glanced over it. I did not give Mr. Franklin instructions as to details. He prepared it himself and he knew all about the whole transaction and he drew it up to conform to those conditions. Mr. Franklin did say something to me about a reason for putting \$2,000 in the deed as a consideration for the mining claims rather than the stock. If I remember right, he said in terms that under the conditions of the contract with the Nielsen Mining and Smelting Company the stock unquestionably belonged to the company and that the only way I could get that in was to make a segregation and put these mines in in this way.

That contract with the Niensens and Lewis, these three instruments, the deed, the transfer of the stock and the agreement were all one transaction, all made at the same time and all one contract. I explained to Mr. Franklin what was the controlling inducement to me in paying \$2,000 before he drew the option. I told him with reference to this transaction the controlling inducement with me in entering into that contract with Nielsen and Lewis was to get that stock. Most assuredly I told that to Mr. Franklin before he drew that option. After I drew this option I returned these checks and this money to the Silver Bell Copper Company. I never received any benefit from these interest checks.

411 On the 15th of October the first option expired and when the 15th of October came the option was extended until September 15th, 1902. I have not had any conversation with Mr. Curtis or any person interested in the Silver Bell Company or any person representing them with reference to extending that option after September 15, 1902. I did have a talk with Mr. Franklin after September 15th, 1902, with respect to the ownership of these properties or of this stock. He told me that inasmuch as there had been no stockholders' meeting to accept or reject that offer of July 15th, 1901, I was still in the same position. Mr. Franklin said that to me several times, down to May 20th, 1903—until the time of the sale. He told me so after this suit was commenced. The first time that I was advised that under the facts and these options I did not hold this stock or those mines as a trustee, if I remember right, was when you (Mr. Ives) informed me yourself, in San Francisco. That was in December, 1903. Mr. Heney also so advised me. Before Mr. Heney and Mr. Ives advised me to that effect I made a full statement of these facts to them. I conducted the negotiations which eventuated in the sale of the Imperial Copper Company. My first negotiation was with Mr. E. B. Gage, and then it was continued with Mr. Beaton. Mr. George A. Beaton and that particular agreement which was in writing, resulted in this sale with some

412 few modifications. I don't know what the date of that was. The first one was on May 13th. I think it was before that probably on March 14th. I think it was.

After that agreement I had conversation with those gentlemen, when the fact that they were going to take this property was discussed or considered. I was first advised that they really intended to purchase I believe it was shortly after I gave them that option, which was for thirty days, I believe. They were here probably ten days before that time, checking up the title, about the 20th of May, 1903; the date fixed in the agreement with Beaton upon which they must close the transaction was May 20th, 1903. During the week or ten days prior to May 20th, 1903 Mr. Robinson and Ben Goodrich, as the attorneys for the company, were here, and Mr. Gage was here off and on also.

While I was negotiating with Mr. Gage, prior to May 20th, something was said about guaranteeing the title to these properties. We had a number of talks about that; they wanted a condition which I would not agree to, something of a guarantee which had no limit and they would not do anything unless I would guarantee the title, that is the way it started. When I say "unless I would guarantee the title," I mean by that, I personally. Mr. Gage told me that he would not buy this property at all unless I did guarantee these

413 titles personally, at any rate, what they insisted upon first was something I would not agree to; they wanted it to have no limit of time. We finally agreed upon this contract which is in evidence here. During that time we had quite a number of conversations with them on the subject. The conferences were between Mr. Gage, Mr. Goodrich, and Mr. Franklin was also present. Mr. Gage first said that he was going to close this deal on the 20th of

May, I think about ten or twelve days previous to that, and the conferences about the title proceeded. The definite terms of the final agreement or guarantee as it is in evidence were agreed upon prior to May 20th, 1903. They submitted the forms of different contracts, and finally this particular one was agreed upon a few days before. After this particular guarantee agreement was agreed upon between Mr. Franklin, Mr. Curtis and Mr. Shelton and myself had a good many conferences; in fact, we had meetings and conferences during that entire week, and for ten days prior to that, the question came up as to what disposition to make, to what I was to have to protect myself under the obligation which I had assumed. I had agreed to renew this offer of mine which the company had an option to purchase. This is the offer of mine dated July 15th, that is in evidence here.

We agreed between ourselves that I should be fully protected, and I impressed that very strongly upon Mr. Franklin. I realized that I was taking very great obligations upon me and it might cost me a great deal of money, and I insisted upon the fullest protection.

I am talking about the agreement protecting me under that guarantee and the various obligations which I had assumed and Franklin then had up—Prior to that something was said about the distribution of the purchase price, about the adjustment of the purchase price. That was also in these conferences, that resulted from these various conferences, that contract between the Mammoth Company and the Silver Bell Company and myself of which this purchase was the result.

Mr. Franklin claimed up to that moment that I was a trustee for this company with respect to the 300 shares of stock and these properties. He said so during these conferences, I believed Mr. Franklin's statement with reference to the character of this ownership; most assuredly I did. And in my action and in the signing of that agreement I relied upon Mr. Franklin's statements; he had been my attorney for years. I consulted no one else.

I cannot state exactly when I first saw that last agreement as we call it, which was never executed, but was prepared by Mr. Franklin and which is now in evidence. I cannot state exactly what date it was, but all of these papers passed within a few days—at about the same time with reference to the 20th day of May, I first saw this long paper just a short time before, probably the day before, or a short time before anyway, before the 20th day of May, I read that agreement. That agreement embodied the oral arrangement that had been made by all of us in these conferences. It covered it all, I believe. My only objection was that it was a very lengthy document and I wanted it shortened. I wanted the substance of it condensed. Franklin said to me with reference to the shorter contract that the contract expressed the same thing as the longer one. He informed me that it was substantially the same as the longer one, only it was in condensed form. Mr. Franklin was not my personal attorney in that transaction as against the Silver Bell Copper Company; he was the Silver Bell Copper Company's attorney and he was also my attorney.

As I have stated, he was my general attorney; he represented me in everything. He was not under any general retainer from me personally. By my attorney, I mean he was the attorney to whom I would go if I wanted any advice in my personal matters. I always consulted him.

Q. Did he during any of these conversations state whom
416 he claimed to be representing in that transaction?

A. I don't remember as that question ever came up.

Q. I will call your attention to page 43 of the minute book of the Silver Bell Copper Company, purporting to be the minutes of a board of directors' meeting held on the 20th day of May, 1903, and I call your attention particularly to these minutes on page 46, with lines drawn through them. Do you know whether these minutes up to and including the point stricken out, were prepared before or after the 20th of May?

A. Why, my recollection is that they were prepared before.

I remember that I saw them at or about the time that I saw this long contract. I told Franklin that it covered the agreement fully, and my objection to it was that it was too voluminous and long.

Mr. Franklin presented me the second agreement, the one that is in evidence on the 20th. I think that is the day that it was executed. If I remember right, it was executed before the payment of the money and notes by the Imperial Copper Company. I was very particular to have protection in this matter, and I impressed that fact

upon Mr. Franklin prior to the delivery of the money and
417 the note and the escrow agreement to the Imperial Copper Company. I discussed the terms of this agreement with Mr.

Curtis and Mr. Shelton. I insisted that my position as I had outlined it first was the same as I told Mr. Franklin. We discussed and I insisted to them that I should have the fullest protection. They said that I ought to be fully protected and that they were perfectly willing that I should be, in respect to these guarantees and these obligations I had assumed.

Prior to the delivery of the note and the money Mr. Curtis, Mr. Shelton and myself had a number of meetings at which Mr. Curtis and Mr. Franklin and myself were present. They were at Mr. Franklin's office and sometimes at the office of L. Zeckendorf and Company and these matters were gone over very thoroughly and very fully and I insisted and claimed that I wanted the fullest protection in assuming these responsibilities and these various obligations of mine, and the result of that was this agreement. It was fully agreed upon between us. These conversations took place before I turned the deeds over to the Imperial Copper Company and put them in escrow. Of course, I would not have consented under any circumstances to passing the title to them unless I was protected. I would not have signed the deeds unless I had had full protection. I realized fully what I was doing.

I remember when Mr. Zeckendorf came to Tucson in 1902.
418 I think it was in the latter part of December, or in the beginning of January, 1902.

He looked into the details of these various transactions and went

through the books of the firm. He looked at these various matters we were interested in and particularly in these large amounts like these mining transactions. He looked into the business generally, into the affairs of the business in general.

The minute book and the stock book and all the papers were in a package wrapped up and in the safe of L. Zeckendorf and Company. They were always there. These minutes and the stock book were in the same place when Mr. Zeckendorf was here in January, 1901. They were always kept in the safe. The safe was open in business hours. Mr. Zeckendorf had access to the safe. Mr. Zeckendorf examined the minute book of the Silver Bell Copper Company when he was here in 1902.

I saw him reading them in 1902. Mr. Zeckendorf came to Tucson in 1903. I think he came here on the 20th of October, 1903; it was in the latter part of October, anyway.

Shortly after Mr. Zeckendorf came here he asked me about why I was holding the money and why there was no dividends declared in the Silver Bell Company. I told him that at the time there 419 was on hand about \$60,000, \$51,000 of which was garnished by Mr. Franklin and there had to be provided for the payments to Volkert on the contract \$12,500 and to the Nielsens \$10,000 and that there could be no dividends under the circumstances. He said that he did not think that the garnishment claim of Mr. Franklin amounted to anything, and he did not see any reason a dividend could not be declared on that. We had several talks and he said that he could not see any reason why a dividend should not be declared under the condition of the company then, but I could not see any reason why I should declare a dividend at that time. I told him that I was perfectly willing that there should be a dividend declared when the next note was paid, which was due sometime, I think it was on the 20th of November. This conversation happened the early part of November, if I remember right. I told him, as I said, that I was perfectly willing that a dividend should be declared on that note, provided, however, that the various stockholders should fully indemnify me in the various matters I had assumed, and that I would first hold out the amount of the Franklin garnishment and pay off these debts, the Francis, Volkert and Nielsen claims, and I would distribute the balance provided I was indemnified, but that did not suit him at all.

He said that the Franklin garnishment did not amount to 420 anything. He had a short time previous to that requested to know who had been employed to defend this Franklin suit.

I told him that Mr. Heney had been employed and that I sent the minute book of the company to him so that he could prepare an answer to the Franklin suit and Mr. Zeckendorf asked one time to see the minute book, and I told him that I had sent it up there to Mr. Heney, and he requested me to have it returned and I wrote to Mr. Heney and requested that he return the minute book immediately; and his assistant wrote me that Mr. Heney had left for Washington and had taken the minute book along with him, that he wanted to prepare the complaint on the train and that he was ex-

pected back in about a week, and that just as soon as he came back he would return the minute book.

I told Mr. Zeckendorf that. I told him a few days after that.

Mr. MESERVE: I would like to see that letter.

Mr. HENEY: I guess we can find it; it was written by my assistant, Mr. Frost.

I think I have that letter; it must be in one of the files. I
421 remember it perfectly. A few days after that, anyway, Mr. Zeckendorf informed me or showed me in the paper where it mentioned that Francis J. Heney had just returned; and he wanted to know why that book had not come. Well, I don't remember whether I wrote or telegraphed to have that book returned; but at any rate I expected the book back any day, because Mr. Heney's assistant informed me that he would return it as soon as Mr. Heney came back, he would send it. I forget just exactly what day it was. Well, I think it was on the 21st day of November; just the day after I had received a telephone message from the Phoenix National Bank that the second note had been paid that afternoon, after banking hours.

I had immediately informed Mr. Zeckendorf that it had been paid. I told him that it had been paid and the next morning Mr. Zeckendorf came around and he asked me if that minute book had come and I said no. I said the train is not in yet, and he said, he wanted to see it and he says: I want to have a talk with you about that; and he took me in his private office and closed the door and he made a demand on me in writing that I should immediately give him a check on the Bank of California for \$50,000, and an order on the Bank of California for \$25,000, to be paid out of the next note,
422 and another one for \$25,000 to be paid out of the last note, making altogether \$100,000. And he made this demand in a very threatening and abusive manner, so much so that I thought he was out of his mind; he was in such a rage, and so I asked him to come into the general office, and I told him then that I refused to comply with the demand; that he had no right to ask me any such a thing, nor to make any such a demand as that; that any money he was entitled to he would get as a stockholder of this company after a dividend had been duly declared, and he said, if you don't give me that money, I'll bring some legal proceedings, and I will compel you to do so. I informed him that he could not make any such demand upon me, and that I would consult an attorney and be guided entirely by his advice in this matter. He said he would wait for the minute book; then he asked me to give him a copy of the letter which I sent to the Bank of California, and I think it is — evidence here. It had been sent before.

It was shortly before the bringing of the Franklin suit and was sent to the Bank of California. Mr. Rochester Ford was the attorney whom I consulted, and who advised me that I send these notes in this manner, in this form, and I give him a copy of the letter which he asked for. The next thing I heard was a letter from the Bank of California. They had collected the note in question and said they

423 were compelled to hold this money under telegraphic request of Mr. Zeckendorf or his attorney. I consulted in the meantime with Mr. Ives, and after talking the matter over, I concluded to go to San Francisco. I then proceeded to San Francisco and Mr. Ives happened to be going on the same train and we went together. I went to the bank the same day that we arrived to see the bank people and they told me—at first I thought of sending Mr. Ives up himself. Mr. Ives went on some business for Mr. Greene so he told me. I did not know he was going on the same train until he informed me.

I went to the bank that same afternoon; the train was late getting into San Francisco. Mr. Ives was with me and we went direct from the train to the bank and we stated the case to them and explained to them the situation under which I held these notes and the proceeds of them. I was prepared to prove to their entire satisfaction that I held them by legal authority, that I was the rightful owner of them, and I demanded that they should turn over the notes and the proceeds to me. They informed me that Mr. Zeckendorf would be in the next morning and under the circumstances they would do nothing until Mr. Zeckendorf arrived. The next morning we went to the bank and they informed us that the train was late and that they would take no action until they saw Mr. Zeckendorf. The next morning after that we went there, and just as we got to the bank we met Mr. Zeckendorf and Mr. Nuttall coming out.

424 As soon as we went in there we demanded an answer and wanted to know what they were going to do. Mr. Anderson, the vice president of the bank, informed me that Mr. Zeckendorf and Mr. Nuttall had left there and expressed the desire and willingness to meet us, and he asked me what time it would be convenient for us to meet them and I said immediately. Mr. Anderson called Mr. Lilienthal by telephone and he said that he would be engaged in some other matters and could not meet us until half past 11 that morning, and asked if it was agreeable to make a definite appointment for 11:30; the appointment was made. We returned to the bank, and just after I got into the bank I was served with an attachment suit with the papers. I was very much provoked. I went to Mr. Anderson and asked him what this meant. I said we were to meet these gentlemen here for a friendly conference and I was served with this attachment suit. He expressed his surprise at any such proceeding. Then Mr. Zeckendorf and Mr. Anderson and Mr. Ives and myself and also the attorney for the bank, Judge Allen, went into a room there in the bank and had a conference. Mr. Ives asked what this meant. He asked for an explanation and demanded to know whether this was a proceeding we were to answer and asked the bank whether they intended to make a delivery of this money and the notes.

425 Mr. Lilienthal stepped up and said they had brought this attachment suit as a temporary expedient; that he was then preparing a stockholders' action in which he would ask for and obtain an injunction to stop the delivery of these notes and money,

and then the matter was discussed further as to what should be done.

About the probability of the settlement and what we would do I said we would do just exactly what I thought of doing in Tucson that out of this first money I would retain the amount of Mr. Franklin's garnishment and declare a dividend, provided I was fully protected. Mr. Lilienthal asked to see the minute book and we agreed to deliver it to them. From the bank we went to Mr. Heney's office, met Mr. Heney there and got the minute book, and Mr. Ives and myself took it right over to Mr. Lilienthal's office. Mr. Lilienthal agreed to give us an answer as to what he would do in the matter about 5 o'clock that evening. At 5 o'clock that evening we received a letter. That is the letter that has been introduced in evidence by Mr. Ives.

The next morning we met Mr. Lilienthal in his office. There was present Mr. Lilienthal, Mr. Zeckendorf, Mr. Ives and myself and we discussed the matter pro and con. Mr. Lilienthal made 426 several suggestions and we finally agreed to a satisfactory settlement of all our difficulties.

We made some minor concessions. I forgot to state in my talk with Zeckendorf in the first place, before there was any trouble or complaint, that I would give a bond for holding this money. I offered to furnish a bond as security. That was before there was any trouble at all. In this conference with Mr. Lilienthal, this same subject was brought up and we agreed to deposit this money in my name as treasurer, and that all I wanted was to be protected. That was agreed upon, the whole matter was to be subject to two conditions, the first was that he was to immediately dismiss the attachment suit, and the second was, that he was to go with me, and in my presence, say to the Bank of California that he was wrong in the position he had taken; that I was holding this money rightfully and in accordance with my agreement with the company.

Q. What was your reason for insisting upon that point?

A. For the simple reason that I had been doing business with the bank for over twenty-five years.

Q. You had arranged all the credit of the firm with the bank all times?

A. I made that one of the precedents. Anyway, it was 427 upon these two issues and these two issues alone, that this agreement became absolutely nothing. I insisted upon these two issues being complied with, and he absolutely refused to comply with them. We returned to Tucson, and I expected in good faith to carry out my agreement with this company. I expected to declare a dividend when I returned here and have this money released as I thought of giving a bond there in San Francisco to have the money in the bank released, and I went to a bond company, a guarantee company, and they wanted quite an amount of money so I did not get the bond there. Mr. Zeckendorf very well knew that he had no claim whatever against me and that he ought to dismiss that suit. Shortly after that came this injunction suit, then followed these other suits which have been gone through here.

During that conversation in Mr. Lilienthal's office something was said about the ownership of the Nielsen stock.

Mr. Zeckendorf said, if I remember right that that stock belonged to L. Zeckendorf and Company. I don't know exactly upon what basis he claimed it, but he did claim it and everything was agreed upon. I said that the matter had already been settled and that we had agreed upon how it would be settled. I mean by the contract, my contract of May 20th, 1903.

428 I did not state at that meeting that I had purchased the Nielsen stock for the Silver Bell Copper Company. I returned to Tucson. Mr. Zeckendorf received a copy of the agreement of May 20th, I mean between myself and the Silver Bell and the Mammoth Copper Company.

I furnished him a copy. We had agreed with Mr. Lilienthal in the presence of Mr. Zeckendorf to furnish him a copy. As a matter of fact up there, I did not know myself that it was in the shape of an agreement, I thought it was on the minute books. We did not find that out until we saw that the minute book referred to an agreement, and then we agreed to furnish Mr. Zeckendorf with a copy of that agreement. That was done upon my return to Tucson.

Stipulation.

Mr. MESERVE:

The deposit tag and the remittance register of the Consolidated National Bank of Tucson, Arizona, shows that on the 20th day of January, 1904, the Silver Bell Copper Company, by J. N. Curtis, deposited in the Consolidated National Bank, the check of E. B. Gage, in the Phoenix National Bank for \$103,867, and that this is the only deposit ever made by the Silver Bell Copper Company in its own name or by J. N. Curtis as the treasurer thereof, in the Consolidated National Bank of Tucson.

429

Mr. Steinfeld Recalled.

Direct examination continued.

Mr. IVES:

At no time during the conferences in San Francisco between Mr. Zeckendorf, Mr. Lilienthal, Mr. Ives and myself or any of us, did I contend that the 300 shares of stock of the Silver Bell Copper Company or the Nielson Mining Company had been bought for the Silver Bell Copper Company. I did not at any time say that those 300 shares of stock issued by the said company had been bought for the Silver Bell Copper Company. I did not say that they had been bought for the Nielsen Mining and Smelting Company. I did not say that they had been purchased for them or anything to the effect that they had been bought purchased or procured for the Nielsen Mining and Smelting Company or for the Silver Bell Copper Company or for the benefit of either of them.

With reference to the agreement of May 20th, mentioned in these previous questions, relative to the Silver Bell Copper Company and the Mammoth Copper Company, these agreements between them and myself and the sending of the copy of the agreement
430 of May 20th to Mr. Zeckendorf, I instructed that a copy should be sent to Mr. Zeckendorf. I instructed Mr. E. S. Ives to do so.

Stipulation.

Mr. MESERVE: The deposit slips and tags of the Arizona National Bank of Tucson, Arizona, and the remittance register of that bank show the following to be the only deposits made by the Silver Bell Copper Company, or by J. N. Curtis, treasurer thereof, namely: A deposit in the name of the Silver Bell Copper Company by J. N. Curtis, treasurer, on the 16th day of January of \$103,867, made up as follows: \$5,000 certificate of deposit on the Phenix National Bank; \$10,000 on the same; \$10,000 on the same; \$25,000 on the same; \$117, not shown what it is; \$1,500 check of Albert Steinfeld on the Phenix National Bank; \$8,500 check of Albert Steinfeld on the Phenix National Bank; \$43,750 check of Albert Steinfeld on the Arizona National Bank; another deposit made on the 4th day of January, 1904 of \$49,987.50 and that was a check on the Phenix National Bank; that \$49,987.50 was a check of Albert Steinfeld on the Phenix National Bank.

431 Mr. IVES: No, sir; it was either the deposit of Mr. Curtis, treasurer, or——

Mr. CURTIS: It was the bank of California. They sent their check to me for that amount and it was through my order to the Silver Bell Copper Company, either that, or just to my order. I forget just exactly which, \$117 of deposits was a cash and was either a check of Mr. Steinfeld on the Arizona National Bank for \$117 or on L. Zeckendorf and Company, or on the Consolidated National Bank for that amount of money.

Mr. STEINFELD continuing:

I remember upon whom that check for \$117 was drawn. It was drawn on the Consolidated National Bank.

Mr. MESERVE: I take it that Mr. Curtis' statement that the check for \$49,887.50 was a check on the Bank of California either in favor of the Silver Bell Copper Company or of Mr. Curtis, the treasurer of the Silver Bell Copper Company, for that amount, and sent by him for collection through the bank, is correct.

Mr. IVES:

Q. On which bank was that check drawn?

432 A. On the Arizona National Bank.

J. N. Curtis Recalled for Further Cross-examination.

Mr. MESERVE: There were no other deposits of yourself as treasurer of the Silver Bell Copper Company of which you have any

knowledge, except the two about which you have testified in the Arizona National Bank and the Consolidated National Bank.

A. Two in the Arizona National Bank and one in the Consolidated. There was only one deposit in the Consolidated.

ALBERT STEINFELD recalled.

Albert Steinfeld.

Direct examination continued:

Mr. IVES:

Q. You have just testified that you instructed E. S. Ives to send a copy of the agreement of May 20th to Mr. Zeckendorf. Please state whether you procured any other papers to be sent to Mr. Zeckendorf?

A. Yes, sir. I wrote a letter making a demand upon him
433 to dismiss those suits which he brought in San Francisco; that I would faithfully comply with all the conditions of that contract; it is this letter which is in evidence, attached to the affidavit of Mr. Harrison, which was read here.

Mr. Zeckendorf did not make any reply to that up to the time of the stockholders' meeting or after the stockholders' meeting. At no time did I ever receive any reply. Mr. Zeckendorf never orally said anything to me prior to the stockholders' meeting with respect to that demand.

Mr. IVES:

Q. Please state what your purpose or intention with respect to the contract of May 20th, 1903, when you made that demand on Mr. Zeckendorf?

A. It was my intention that if Mr. Zeckendorf failed to comply with my demand and dismiss those suits, to call a stockholders' meeting and take such action as was necessary to annul and rescind that contract, just as prayed for in the complaint.

Mr. IVES:

Q. In your last answer, to what complaint do you refer?

A. Why, the complaint Mr. Zeckendorf filed in San Francisco, in the injunction suit.

434 Q. In the direct examination Mr. Zeckendorf testified with respect to the conversation between him-self and you in 1901, as follows: Mr. Steinfeld said I bought three hundred shares of the Nielsen Mining and Smelting Company stock for the company. I did buy them for L. Zeckendorf and Company. Did you say that?

A. No, sir.

I did not say anything substantially like that. I never said to Mr. Zeckendorf then or at any other time that I had bought three hundred shares of the Nielsen Mining and Smelting Company for the company. I told him that I had bought it for myself, and handed stock books there are pencil marks, on the stubs November 20, 1903;

those pencil marks are in my handwriting. I think the date it refers to, is the date that I tore that certificate from the stub to deliver it. Prior to January 1, 1901, no certificate had been detached from the stub in the stock book, except that one No. 2, of the Nielsens, the certificate for the three hundred shares, to the order of Carl Nielsen, had been torn out prior to January 1, 1901.

It was some time in the latter part of June. I sent it by Mr. Cooper to the Atlas and Red Rock Camp to have Nielsen endorse it and also sent a bill of same to cover it.

435 Mr. Zeckendorf never did in January, February, March, April or May of 1901, show me the writing in his handwriting, on the book or stub of certificate No. 5 which is in evidence. Mr. Zeckendorf at the time or about the time he drew the certificate for 300 shares of stock to the order of Albert Steinfeld, trustee, did not show me such certificate. He did not at or about the time tell me he had drawn such certificate to Albert Steinfeld, trustee. He did not at any time in 1901 tell me that he had so done.

Q. In Mr. Franklin's testimony he states referring to a conversation between himself and yourself substantially as follows: I have made a contract referring to the original contract of May 20th, or the long one, as we will call it, very fully, because Mr. Zeckendorf does not know anything about these English properties. Did Mr. Franklin ever state to you or express himself in such a way or lead you to believe that Mr. Zeckendorf didn't know anything about these English properties?

A. I don't remember any such conversation. Prior to my trip to Europe in 1900, I had made effort to sell the Old Boot mine and the claims which belonged to the company at that time. We were asking, if I remember correctly, \$150,000.

436 WITNESS: We never had a direct offer at any price, but it was intimated to me by some parties that Judge Barnes was negotiating with us on the basis of \$150,000; they might consider a purchase.

Mr. Ives:

Q. Mr. Steinfeld, did you ever make an agreement with Mr. Curtis as an officer or director of the Nielsen Mining and Smelting Company, or any one in behalf of that company, or its attorneys, at any time, with respect to the 300 shares of stock of the Nielsen Mining Company other than the contract which was executed between the Silver Bell Copper Company, the Nielsens and yourself, dated June 29th, 1900, which is in evidence and in writing, and with the further exception if it be called a contract, then the option which you gave the company and the extension which you gave extending such option to the 15th day of October, 1902, and contract of May 20, 1903?

A. None other.

In my testimony on cross examination by Mr. Meserve, I stated as follows:

I personally employed Mr. Shelton. I meant that as an employee of L. Zeckendorf & Co. I employed him for the firm. At the time

437 I employed him I was the managing partner of L. Zeckendorf & Company. I went into partnership with Louis Zeckendorf on February 18th, 1878. He was living then in New York. He has been living ever since then at that same place. The business here in Tucson has been under my charge ever since I have been here. In 1878 I became a partner, but then I was connected with the firm since 1872. The firm of L. Zeckendorf & Co., has been running in that name since February 18th, 1878. It has been running in the name of L. Zeckendorf & Co. here since that time. Before that it was A. L. or A. & L. Zeckendorf; before that it was Zeckendorf Wellish, but that Zeckendorf was William. Mr. Louis Zeckendorf was here from 1878 to 1892 twice. I think he was here in '80 and '84, three months, maybe a couple of months; so that practically I have run the business alone from 1878 up to the time of the dissolution continuously. In 1892 he did not come here for the purpose of conducting this business. He came here on some private business of his own. He was only here off and on from 1892 to the present time.

Mr. Zeckendorf discharged one of the employes of L. Zeckendorf Co. in the years of 1901 or '2 or '3 that I know of. That was Hugo J. Donau. Mr. Donau at the time when he was discharged was manager in the store; he was the head man after myself. After Mr.

438 Donau's discharge, the fact was known to the other employes of the firm of L. Zeckendorf & Co.—I mean after he had been discharged by Mr. Zeckendorf. It was known to Mr. Shelton, I know it was known by the fact that he had left the store, by his going away at the time of his discharge. This discharge took place sometime in April or May of 1901. I opposed the discharge of Mr. Donau. The fact that I had opposed the discharge of Mr. Donau was known to the other employes of L. Zeckendorf & Co. The fact that I opposed the discharge of Mr. Donau was known to Mr. Shelton. I told him so myself at that time. I know Mr. Curtis knew that the discharge of Mr. Donau by Mr. Zeckendorf was against my protest. I told him so. I told Mr. Curtis that Mr. Zeckendorf discharged Mr. Donau over my protest; at that particular time, there were a number of conversations. Mr. Zeckendorf was trying to convince me that he ought to discharge Mr. Donau and I was trying to convince him that he ought not to discharge him, and it finally resulted in him assuming the responsibility himself of discharging him.

Q. Now, Mr. Steinfeld there is evidence that after the commencement of this action and in the month of January, 1904, you purchased the stock of William Zeckendorf. Please state how you arrived at the figures in brief of the purchase price of that stock and why you paid that amount of money for such stock?

439 A. The figures and statements are already in evidence here. As I was trustee for Mrs. Zeckendorf I was not represented at this stockholders' meeting and I concluded to purchase his stock upon the basis of what would have been received if there had been no revission.

The 30 shares of stock which I purchased from Wm. Zeckendorf

stood in my name as trustee. I did not vote that stock at the stockholders' meeting.

In one of my letters put in evidence by the plaintiff, written to Mr. Zeckendorf in the month of May or June, 1904, I forgot which, I said: I enclose a copy of the two agreements. I do not exactly remember what two agreements were enclosed in that letter, but I believe they were the agreements that I had with the Imperial Copper Company in this sale.

I intended to and believe I did—I believe I sent copies of all papers that were made. There were some duplicates and some originals. I remember the agreement whereby I and others guaranteed Mr. E. B. Gage the titles to these properties. I believe that guarantee was one of the agreements or copies which I sent to Mr. Zeckendorf in 1903. It seems to me there were several. At any rate, to the best of my recollection, I have a copy of everything made at that time.

440 Mr. HENEY: You will admit that a stockholders' suit commenced by Mr. Zeckendorf in San Francisco, is still pending, will you not?

Mr. MESERVE: I know nothing about that suit except what there is in evidence here.

The COURT: I think the record shows that it is still pending.

I sent to Louis Zeckendorf a list of the claims of the mines that belonged to the Nielsen Mining and Smelting Company prior to the changing of the name to the Silver Bell Copper Company.

To the best of my recollection, it was referred to in a letter which is in evidence here, in December, 1899. I sent the trial balance showing the actual condition of the Nielsen Mining and Smelting Company at that date, I think it was December 1st, 1899, and giving the name of every property that the company owned at that time.

I have not a copy of the list I enclosed in the letter.

Mr. HENEY: Addressing counsel on the other side: Will you produce it?

441 Mr. MESERVE: Yes, sir; here it is.

Mr. HENEY (showing the witness the paper): Do you remember of having sent the paper now in your hands?

A. Yes, sir. That was the paper that was sent to him, but this is not all of it.

Mr. HENEY, to opposing counsel: Will you produce the balance of it?

— To the best of my recollection I sent with that paper which I now have in my hands a trial balance of the Silver Bell Copper Company, a detailed list of the properties owned by that company at that time, a detailed list.

Q. Can you take this map and tell us what the names of those properties were?

— I don't know as I can do it from memory. I subsequently sent to Mr. Zeckendorf a more detailed list after this sale, and I think that is a copy in my book. I think that would give it, after its sale to the Imperial Copper Company. That was a list there would show exactly what the company owned at that time.

442 That list of claims was made from the records of the company. *In* correctly sets forth the list as they appeared on the records of the company. The record as to the claims owned by the Nielsen Mining & Smelting Company, December 1899, — in the same condition as that part of the record was in, *when* I copied the list in this letter from.

Q. From that will you read what the claims were that were on the record in December, 1899?

A. Imperial Copper, Accident, Black Rock, Sampson, Detroit, Swansea, Emerald, Paige, Papago, Hilda, Millionaire, Trudie, El Poo, Queen, Black Eagle, John F. Bell Pope, Maggie, Spike, Billy, Frank B., Wedge, Alliance, Northern Strip, Fraction and Enterprise.

I put on the list which I sent to Mr. Zeckendorf in December, 1899, these same names. I took them from the record.

I believe that Mr. Curtis had a mining account there in which the list of each mine was given and to that mine an account was kept.

One of these letters to Mr. Zeckendorf to myself which is in evidence, refers to a coffee deal which he had made, and suggests that the firm could probably use some of it. That was not a deal on behalf of L. Zeckendorf & Co. That was Mr. Zeckendorf's personal deal. I had no interest in it. I remember the occasion of the

443 receipt of a letter from Mr. Gage after May 20th, 1903, and prior to November or prior to December 1st, 1903, relating to a man named Smith or Miltenberg.

I am referring to the transaction about which Louis Zeckendorf testified.

I received a letter from Mr. Gage enclosing to me a letter of Superintendent Percy Williams, the superintendent of the Imperial Copper Company. In this letter Mr. Williams stated that one Smith, was doing the assessment work on what was known as the Imperial claim, he claiming that that was a part of his mine and enclosing a sketch of the mine which was claimed by Smith. This Smith was working on what was known as the Miltenberg claim. They were interested together but I don't know exactly what their relations were. The Imperial mine was one of the mines which I had guaranteed and I showed Mr. Zeckendorf that letter.

This was after my conversation with him in regard to distributing the funds of the corporation. We had several conversations about this matter, it had been discussed pretty freely. I told Mr. Zeckendorf that I knew something about the merits of the case and it did not amount to very much and that matters could be easily adjusted.

444 Mr. Curtis had explained to me how these lines run and I did not anticipate any difficulty. At the same time it was a matter we had to give attention to as it was a conflict against one of the claims the title to which I had guaranteed. Mr. Zeckendorf asked me what that Imperial claim was and where it originated. I told him it was one of the claims which I had purchased and he made the remark that if that was so, he had nothing to do with it. So far as the Silver Bell Company was concerned it was a matter of mine. I told him it was very strange that he should take that position, because the Silver Bell Copper Company was receiving the pro-

ceeds of the sale and I could — see why I should be held personally in the event of such conditions coming up under the terms of my guarantee.

Interest was charged by L. Zeckendorf & Co. for the moneys advanced by it to the Silver Bell Copper Company from the date of each advance and 10 per cent per annum. Interest was charged on merchandise sales after sixty days from the date the goods were shipped, at the rate of ten per cent per annum; the usual rate of interest in Tucson from 1900 and including 1900 down to and including 1903, on loans at the bank, without security was about 10 per cent.

There was a provision in the contract of May 20th, 1903, providing for the cancellation by me of a note by agreement. I cancelled that note at that time. The first payment of the Silver Bell
445 Copper Company of the whole sale to the Imperial Company on May 20th, was made by E. B. Gage, by check on the Phoenix National Bank; his personal check. That was on May 20th, 1903.

That share of stock that stood in the name of R. K. Shelton the 20th day of December, 1903, I gave it to him. I believe at the same time, in the latter part of December, after my return from San Francisco I delivered to him the certificate of stock and I told him that I gave it to him. It was his unconditionally. I never asked him to vote it or to do anything on account of that for me afterwards. I never told Mr. Shelton that the one share of stock originally issued to him did not belong to him.

Cross-examination of Albert Steinfeld.

I never raised my offer on these mines or mining property at all up to the time I made the sale to Mr. Gage and his people in 1903. I mean any bona fide offer.

I acted in the dealings with the Gage people and by the Gage people I mean Mr. Gage and Mr. Beaton, now spoken of as the Imperial Copper Company people, when these negotiations were in progress. I was the person who interviewed and wrote to Mr.
446 Beaton and Mr. Gage in all the preliminary negotiations, and fixed the price of \$515,000 on these mines. After I fixed that price of \$515,000 I framed that letter to E. B. Gage, that is in evidence here, what we call the Gage letter, and one to Mr. Beaton, which we call the option, and I fixed the terms as stated in these letters whatever they were. It was the result of these negotiations between them, Mr. Gage and Mr. Beaton and myself. Mr. Beaton was here personally and Mr. Gage personally. We had many interviews before writing these letters with Mr. Gage and with Mr. Beaton. I believe the first price I asked was \$600,000. That was the price I put on these mines in the first negotiation. All those negotiations were with me, and I named the price \$600,000.

The whole matter was consummated in a very short time, probably a month, probably two weeks.

Then I formulated a proposition which was submitted at first in it I provided for a mortgage and a note back, and afterwards I modi-

fied that; then fixed the price at \$515,000 on the terms as they were afterwards accepted and carried through. I first notified Mr. Curtis that I had fixed that price of \$515,000, at the time he was here, at the same time; and he knew the price I was fixing on the property. I told him I had fixed the price of \$515,000; he was present with those people, Mr. Beaton and Mr. Gage; I think he was present at all the negotiations I had with Mr. Beaton and at all talks I had with Mr. Beaton and Mr. Gage. So that when I wrote that letter wherein I recited that I would cause to be conveyed or would convey all interests of the Silver Bell Copper Company to these people, and all the interests of L. Zeckendorf & Company, Mr. Curtis was familiar with the terms of that letter. At that time he was President of the Silver Bell Copper Company and I knew him to be such. He was President, but I don't know as he took any official part. I consulted with him. The conclusion as to what the price would be was the result of various conversations; when it was concluded and the price fixed, I did it. I stated that I had conferences almost daily prior to May 20th, 1903, during the time that Mr. Goodrich and Mr. Robinson were here; and during the time when we knew they were going to take up the option and different things were being discussed. Mr. Goodrich or Mr. Robinson, or both of them in fact, insisted on the necessity for the guarantee. I don't remember any discussion of that previous to that. It was after writing these letters that I have spoken of here.

Q. Now, you stated that you had daily meetings just before and immediately preceding the 20th of May. State just how these meetings were held and who was present and what was said?

448 A. I can't remember everything that was said, but we held the conferences at the store of L. Zeckendorf & Company.

Q. They were not formal meetings were they? Was there any record kept of them?

A. I don't know as they were very formal. I remember the meeting of May 13th.

Q. Do you remember any formal meetings prior to May 20th?

A. Probably there was no formal meeting, but they were meetings almost every day.

Q. Who do you mean?

A. Mr. Franklin, Mr. Curtis, Mr. Shelton and myself. We were discussing the manner of drawing up the agreement to cover the different conditions required to carry out this sale.

I discussed matters a great deal with Mr. Franklin, and it is possible that at some of these meetings, Mr. Shelton was not present. Mr. Curtis was there all the time.

It is not a fact that Mr. Shelton was not called in except to attend a formal meeting. I think he was there several times when we discussed these several matters. It is my impression he was there several times prior to May 20th. I do not remember anything I said to him or anything he said at these informal meetings.

449 Mr. Curtis and myself and Mr. Franklin did take an active part in these discussions; it is my best recollection that Mr. Shelton was also there, but he might not have been there at all of them.

Q. Have you any distinct recollection of any action where Mr. Shelton was present, except at the formal meeting of May 13th, 1903, prior to May 20th?

A. My recollection is that he was.

Q. Have you any distinct recollection now of any meeting at which he was present?

A. There was so much said that I can't possibly remember all. There were a great many meetings.

Q. Mr. Franklin during all the time, for all of eight or ten years prior to his bringing his suit against the Silver Bell Copper Company was your private attorney?

A. Whenever I had any legal business I never consulted anybody else. He attended to it always.

Q. You had a great deal of legal business during these years, didn't you?

A. The firm did, but not I personally.

450 Q. You had some personally?

A. Very little. The firm had a great deal.

Q. He was the attorney for the firm of L. Zeckendorf & Co. and consulted by you as such?

A. Yes, sir.

Q. You spoke about remembering that Mr. Zeckendorf read the minutes of the Silver Bell Copper Company in the year 1902. Where was Mr. Zeckendorf when he read those minutes?

A. I saw him several times in his private office reading them. In the year 1902.

Q. You remember that year distinctly, do you?

A. I think I do.

He did not make any comment on them. He did not say anything about what they said. He didn't ask me for any documents referred to in these minutes.

Q. Mr. Zeckendorf was not in the habit at that time, was he, of reading a record that referred to a document without asking to see it?

A. I don't know whether he was or not.

That was the only corporation in which he was interested at the time.

Q. In any of the business of the firm, did you ever know
451 of Mr. Zeckendorf picking up a record that referred to a document without asking to see the document.

A. I don't remember.

Q. You are willing now to state that in the year 1902, that you saw him reading these minutes several times?

A. Well, he had the book open; it was in front of him on his desk.

A. At that time the minute book showed the record of your so-called form of option of July 15th, 1901?

A. It was July 15th, 1901. Yes, sir; the book showed it.

Q. And showed that there was certain property known as the Francis and Volkert and English properties?

A. Yes, sir.

In December 1900, I returned from Europe and went to Mr.

Zeckendorf's office. On different occasions I met him at his house and had lunch with him at that time.

Q. Did you have any conversation about what you did in 452 England, other than in his office?

A. I don't remember whether we did or not; the matter was not discussed.

Q. In how many conversations that you had with Mr. Zeckendorf in December, 1900, were references made to your having purchased the English mines?

A. Well, I distinctly remember one, and possibly there were others.

Q. Do you remember one with sufficient distinctness now so that you know the matter was discussed?

A. Yes, sir.

Q. Mr. Steinfeld, when you called Mr. Zeckendorf's attention to the fact that you had paid \$2000 of your own money to the Nielsens what did he say about that being very generous in advancing that money to the corporation?

A. He did not say that I was generous for advancing it for the corporation; as near as I can remember, he said, that I was very considerate in not asking or getting the firm of L. Zeckendorf to advance it or making any demand on the firm, or asking him to put his money up, that he thought I was very considerate in putting this money up myself, and in buying these mines myself, or something to that effect.

453 Mr. MESERVE:

Q. I will call your attention Mr. Steinfeld now, to a letter handed me by your counsel dated New York, May 15th, 1903 on the letter head of L. Zeckendorf & Company, it is addressed to Albert Steinfeld, and I will ask you if this is the original letter written by Mr. Zeckendorf to you on that date?

A. Yes, sir.

Q. Now, I will ask you why, when you replied to this letter of the 18th inst. written you by Mr. Zeckendorf in which he made a complaint about never having been informed about these transactions, and if he had read the minute book in 1902, why did you not direct his attention to this when you made him acquainted with these things?

A. I don't remember why I didn't, but on my return from Europe I was in New York only a short time, and he asked me what I had done about these properties and I told him I had bought them, and he asked me the amount I paid and I told him that I had bought them very cheap.

Q. Now, Mr. Steinfeld, after that conversation that occurred in New York between you and Mr. Zeckendorf, why, when he complained to you in this letter of June 18th, didn't you call his attention to that conversation in reply to that letter?

454 A. I- was not discussed very much it was just mentioned incidentally.

Q. Why, if you mentioned it incidentally, or at all, why didn't you call his attention to it in his letter?

A. I may state that I had told I am satisfied that I did.

Q. Why if you are satisfied that you did tell him, didn't you mention that fact in answer to this complaint. Mr. Steinfeld, did you ever tell him anything about the Francis and Volkert purchase and of the sale of May 20th?

A. I think he was out here a short time afterwards.

Q. Why didn't you mention that fact in this reply, where he said, I never heard of the Francis and Volkert business before?

A. It was not discussed very freely, just in a general way.

Q. In that letter he tells you I never heard of it at all, and he criticises you for not telling him. Why didn't you answer?

A. He was here in 1901.

Q. When you replied to his letter of June 18th, 1903, in
455 which he criticises you for not telling him these things and especially directed your attention to the fact that you had many opportunities to tell him, why didn't you say you are mistaken?

A. Well, I did tell him. As I state in my letter, I was involved myself very much and the firm of L. Zeckendorf & Company was very much involved, and he was very much alarmed and I didn't want to burden his mind with these propositions.

Q. I asked why, if all that be true, when you answered his complaint, you did not tell him of that fact?

A. Well, I did tell him.

Q. And *how* you no other answer for this question?

A. No, sir.

I have executed on behalf of L. Zeckendorf & Company and myself a good many documents in my business career. I always read them over before I executed them. I think this was true during all the time. I read them over, of course; but I always relied in matters of that kind on my attorney.

Q. And did you ever tell your attorney when he presented
456 you a document for signature that it was not what you wanted, but that you wanted something else?

A. Perhaps so.

Q. And that attorney was Mr. Franklin?

A. Yes.

Q. I again direct your attention to your answer dated June 30th. Here is the part to which I wish to call your attention. You said that if they would return you the money which you had paid to the Nielsens you would turn the property over to the company, and he said that you were very considerate in advancing the money to this company. I will ask you whether he made that statement to you in 1901?

A. Well, probably he did.

I know he made some remark there at the time that I made this statement, and I remember, that I showed him the contract, under which I purchased this stock and paid this money.

And he then said to me at that time, on this date in 1901, before I went to San Francisco, he stated what I have said.

Q. That is, that he then stated to you that you were very consid-

erate in making such advances personally for this company. Did he say that?

457 A. Well, perhaps he used the word company? He probably did. I know positively that when that matter came up the question was discussed with him, the whole transaction came up at the time.

And it was in connection with that transaction that I handed him the form of that certificate of stock which I had previously sent out to the Nielsen- through Mr. Cooper, to have signed. I handed him the contract at the same time which is the contract in evidence.

When I wrote that letter to Mr. Zeckendorf in December 1901, sending this trial balance I did not have the record of the Silver Bell Company here at that time.

Q. Did the records of the Silver Bell Copper Company as used by you in connection with that letter, or trial balance or all those records I mean here now in court. What I want to know is if you made that statement up from the records of the Silver Bell Copper Company and do you understand the records of the Silver Bell Copper Company to mean its set of books.

A. If these are the books of the Silver Bell Company, yes. This statement was made up while I was *was* out at the Silver Bell and from the records and books that they had there at the time.

Q. I will ask you whether or not the Silver Bell Copper Company, or Mr. Curtis kept any other book than a journal cash book, ledger, letter press book, etc.?

A. I could not tell you what books they kept. They kept quite a number of books.

Q. Can you look at these books and tell?

A. Well, I know that was taken from one of the books there at that time.

When I was in San Francisco with Mr. Ives he was acting there in these negotiations as my attorney. I spoke about certain personal properties of the Globe Minerals Company that was purchased. The Silver Bell Copper Company purchased that property, for its own use and benefit.

Q. Mr. Steinfeld, here is the journal of the Silver Bell Copper Company showing particularly, December 1st, 1901, on page 269. I want to call your attention to the Silver Bell Copper Company of December, 1901, and the fact that under that date in page 269 of that journal there are a number of names of mines set out. I ask you whether prior to that date, any books of the Silver Bell Copper Company or in its possession, showed any segregation of those mines out there at that place?

A. I could not tell you.

459 Q. I want to ask you if this is the record book you made that up from?

A. I didn't make it up.

Q. Didn't you make that statement you referred to?

A. No, sir; Mr. Curtis gave that to me. He included in it everything that the company had at the time.

I did not myself write any part of the trial balance or of the state-

ment containing the list of mines which I say I sent to Mr. Zeckendorf; that was made up by Mr. Curtis—Curtis during sometime in 1899, while I was at the Silver Bell camp. These are the identical papers that I sent to Mr. Zeckendorf.

The month that Mr. Zeckendorf insisted on Donau being discharged, my recollection is that it was during the month of April, 1901. His salary stopped for Zeckendorf and Company in September, 1901.

Mr. Donau had, previous to Mr. Zeckendorf's discharge of him, been promised a vacation. He had been working very hard for several years and did not leave the city. I had promised him this vacation and that his salary should continue and during the vacation

Mr. Donau claims that he was entitled to his salary for the 460 year and that he had been employed by the year and not by the month, and he talked something about bringing a suit against us. At any rate, I had promised him his vacation and I allowed his salary during the vacation as I had promised him.

Mr. Zeckendorf discharged him before he left. His vacation was of about sixty days' duration. Hugo Donau was a brother-in-law of myself and is yet, and a brother of Alfred Donau; and Alfred Donau is a son-in-law of Mr. Curtis. Mr. Zeckendorf was consulted about paying Mr. Donau this salary after he was discharged. At the time I told Mr. Zeckendorf I was not going to have any law suits on my hands. I told him it was better to allow this salary than to have the question come up in the shape of a law suit. He said he didn't think he was entitled to his salary, but I paid it just the same. I had agreed to it and I allowed him his salary during his vacation.

The controversy between Mr. Zeckendorf and Mr. Donau and myself was with reference to certain charges Mr. Zeckendorf was making; that Mr. Donau was stealing from the firm. He claimed that Mr. Donau was very incompetent and for some reason he did not like him. He didn't tell me at that time that there was any connection with certain cattle transactions that Mr. Donau was not doing the right thing or make any statement of that kind. Mr. Zeckendorf

claimed that he was interested with me personally, and with 461 which Zeckendorf & Company had nothing to do; that was some part of the controversy at the time. I was interested in a cattle company and dealing in cattle on my own responsibilities. Whenever I was away, Mr. Donau had complete charge of the business. I was generally away two months of the year; and whenever I was away Mr. Donau was in full charge. He had detailed management of it under my directions; under my general direction.

When I came back from San Francisco before this stockholders' meeting of December 26th, 1903, I said to Mr. Shelton, this share of stock standing in your name, I desire you to own it unconditionally. I did not ask him for any pay and he did not pay me anything for it and never has. He had performed many services outside of his employment and I desired to give him this share of stock. I don't remember — Mr. Ives told me to do that or not. I won't say definitely whether he did or did not. I don't remember that he formulated that statement for me to make to Mr. Shelton. Mr. Ives was acting as my attorney at that time.

Mr. HENEY:

I advised him in San Francisco myself, to give Mr. Shelton that share of stock so that there would be no question about there being dummy-stockholders, and so that he would be able to act independently.

462 I was present at the time of the taking of the deposition of Mr. Shelton in the office of Hereford & Hazzard on January 29th, 1904. I remember that frequently during that time, questions would be propounded to Mr. Shelton and Mr. Ives started in to answer and he declined to answer.

Q. I will call your attention to this item here, the account I notice on the heading November 23rd; that is Mr. Zeckendorf's handwriting in pencil?

A. Yes, sir.

A. And the balance is your handwriting, both in pencil and in ink?

A. Yes, sir.

Q. Do you remember handing that to Mr. Zeckendorf?

A. No, sir; I do not, but it is my handwriting.

Q. At any rate you say all that is your handwriting except the date?

A. Yes, sir.

Mr. MESERVE: We offer in evidence the Silver Bell Copper Company in account with Albert Steinfeld, it is plaintiff's exhibit 149.

463 *Cross-examination of Albert Steinfeld Resumed.*

I was a witness on behalf of the defendants in the case of Franklin against the Silver Bell Copper Company. On the trial of said action I testified as follows:

"I heard the testimony of Franklin in regard to how that proposition of July 15th, 1901 was prepared. I mean the conversation between myself and him in regard to it. That conversation was not true.

Upon my return from England in December 1900, I went to Mr. Franklin and explained to him what I had accomplished in London and I told him it was my intention or desire to give the Silver Bell Company the opportunity of buying this property from me at the amount of money which had been paid plus the expenses and interest which had accrued, and I requested him to draw up something to cover the ground.

Finally that resulted in the proposition of July 15th. He told me that was the right way, and he told me at the same time that I was a trustee for the company. I did not care whether I was trustee or not, but I intended to give this company the opportunity of buying from me and wanted him to put the proposition in this shape.

At the expiration of that four months that proposition was renewed for twelve months. I again renewed it at the time of the sale. Franklin or nobody else at that time insisted that

I should do that. I did it voluntarily; I didn't at any time request Franklin to do anything in the sale of these properties to the Imperial Copper Company.

At the time of the first shut down of the mine in 1900, the indebtedness due from the Nielsen Mining and Smelting Company was something like \$75,000 or \$85,000. The amount of indebtedness due from the said company to L. Zeckendorf and Company was a little over \$100,000.

(The papers and accounts are put in evidence in connection with the cross examination of Steinfeld to be numbered the same as plaintiff's last exhibit 150.)

Redirect examination:

At the time the Franklin case was tried, I had not had occasion to discuss the conversations that were testified to by Franklin in that trial that took place between him and myself in regard to these matters with anyone.

In the Franklin case I had not time to prepare for it. Mr. Heney came down one morning and we went to trial the same day. In this case I have gone into it very fully by looking into a lot of
465 records and transactions, and my memory is very clear. If there are any inconsistencies, I believe that what I now testify to is substantially correct; that these are the facts as they occurred.

I had no other attorney in the Franklin case before Mr. Heney got down here. Ives was employed in the Franklin case on the day of the trial.

In the course of my business dealings with Zeckendorf he has not at any time, other than in the latter part of June, 1903, declared that he had no knowledge of the matters which I had previously talked to him about and explained to him.

That check (referring to the check dated December 26th, 1903, No. 478, handed witness) is the check I testified that I gave to Mr. Curtis in conjunction with a certificate of deposit for \$18,000 on December 26th, 1903. That check was actually delivered to him on the date that it bears.

I didn't request him nor did he promise that he would not present it for payment. Nothing was said about his not doing so. The check next came into my possession when I got a statement from the bank after it had been paid.

(The check with all the endorsements upon it offered in evidence, received and marked Exhibit "PP.")

466 Q. I hand you what purports to be certificate of deposit of L. Zeckendorf and Company, bankers, dated December 26th, 1903. Whose signature does it bear?

A. L. Zeckendorf and Company. I wrote it on December 21, 1903. I gave it to Mr. Curtis for the sum of \$18,000. I gave it to him on the 26th day of December, 1903, to go with the check for \$117. I told him what it was for at that time. It was a payment, according to that rescission contract; in payment of the money in ac-

cordance with that rescission; I mean the money that was paid to me by the Silver Bell Copper Company, May 1903, which I returned, and for the mines in my name and in the name of the Mammoth Copper Company.

Mr. HENEX: We will offer that certificate of deposit in evidence to go with the check.

At the time I gave Mr. Curtis that I didn't request him not to present it to L. Zeckendorf and Company for payment or to deposit it in the bank. There was no talk between us on the subject. At that time I had a deposit with L. Zeckendorf and Company, the amount of \$18,000 belonging to me personally. This check (referring to paper handed witness) is a check dated January 14, 1904, to the order of Silver Bell Copper Company drawn on the Arizona National Bank for \$43,750.

467 It bears my signature. I signed it on January 16th, 1904. I gave it to Mr. Curtis on that day, \$25,750 of it was under that contract of division, and then that \$18,000 was the amount of the certificate which Mr. Curtis had not cashed. He turned that over to me and I gave him a check for it. This check represents that certificate of deposit for \$18,000, which was returned to me. There had been no previous agreement that that should be done. There was no agreement as to either one of these checks of December 26th, 1903 at the time I delivered them on December 26th, 1903, to Mr. Curtis that he was not to present them or deposit them.

Check for \$43,750 offered in evidence.

At the time I made the proposition of July 15th, I believed I was a trustee. Mr. Franklin so represented to me and I believed I was a trustee, anyhow. Mr. Franklin particularly told me so before I offered to pay out anything. When I renewed this option on the 20th day of May, 1903, Franklin had stated to me repeatedly that until the meeting of the stockholders met and passed upon that offer of mine, that I was a trustee, and continued to tell me that until the time of the sale, and continues to tell me that now. At the

468 time I renewed it, I relied upon such representations of Mr. Franklin. I mean I believed it. When I say that I renewed the proposition of July 15, 1901, at the time of the sale, I do not mean that I renewed the exact proposition. We changed the offer under certain conditions coupled with it. I do not mean to say that, I prepared another written proposition and submitted it to the company. I think whatever it is, was a matter of record there in the shape of resolutions passed at that time, or a contract. I do not know whether that resolution refers to a renewal of the contract between the company and myself. The record speaks for itself.

Q. What did you mean in the cross examination in the Franklin suit by the words, you "did it voluntarily."

A. Mr. Franklin explained to me at the time that I was a trustee, as I have already said, and that there was nothing else for me to do excepting to sign that. By "voluntarily" I mean that I was willing to renew this same offer which I had made.

I would not have offered to let the Silver Bell have the whole of the proceeds of the sale of that group of mines of May 20, 1903, if Franklin had not advised me that I held them as trustee, and that I was compelled to do it anyhow. My reason for agreeing to the terms that were embodied in the contract of May 20, 1903, which was executed, were that Mr. Franklin informed me that I was a trustee. I would not have agreed to that if he had not so informed me.

J. N. CURTIS recalled as a witness for defendants, testified:

Referring to Ledger "B," plaintiff's exhibit 121, I saw that book in December, 1899. The list of miners appearing in the index under the letter "M," of that book was in said book at that time. All the mines enumerated there belonged to the Nielsen Mining and Smelting Company at that time, except Cababi mines and the Identical. The remaining names there are the names of all of the mines then owned by the Nielsen Mining and Smelting Company. That book was at the mines in December, 1899, when I was there.

Nielsen had one-half interest in the Identical mine and he spent this \$170 on it the same as the Cababi. I found them both out at the same time and charged him probably in that settlement.

Cross-examination by Mr. MESERVE:

There were no other records of the Silver Bell Copper Company other than those which are in evidence and the little book that I have referred to.

It is stipulated that either party before the final submission of this case, may present to the court a copy of such portions of Franklin's testimony in the case of S. M. Franklin against the Silver Bell Copper Company, which was tried before the Hon. George R. Davis, commencing on the 11th day of June, 1904, as either party may desire to enter as part of the evidence in this case; and that such copy when so presented, shall be a copy of the record in this case; but this stipulation does not include the exhibits mentioned in Franklin's testimony; and that upon the argument, either party may read from the stenographer's minutes of Franklin's testimony in his own case.

The defendants agree to file with the clerk of this court within ten days from this date a copy of such portions of Franklin's testimony as the defendants desire to have a part of the record in this case; and the plaintiff agrees within ten days thereof, to file with the clerk of the court copy of such portion of Franklin's testimony as the plaintiff desires to be a part of the record in the case.

In pursuance of the foregoing stipulation, the defendants filed the following portion of Mr. Franklin's testimony in the case mentioned in said stipulation:

Testimony of S. M. Franklin Offered by Defendants.

Q. Which Mr. Zeckendorf; give his initials?

471 A. Mr. Louis Zeckendorf; he is the only Zeckendorf I ever knew in this transaction. He was here at the time when the amended articles were made. He presented to me some stock certificates purporting to be drawn up under the new company. He asked me if they were in proper form. I looked at them and read them and saw that they were in proper form and I also looked at the number of revenue stamps on them. There was one in the name of Albert Steinfeld, trustee. He had written something himself on that one. The certificate itself will say that. I had nothing further to say about it. I said that is all right. The three hundred shares of Albert Steinfeld, trustee, were the three hundred shares purchased from Nielsen.

Q. They had been purchased previously from the Nielsen Mining and Smelting Company?

A. Yes, sir; on June 29th, 1900. How they managed that transaction I don't know. I noticed that Mr. Curtis instead of having one-third, had only 170 shares. I asked no questions about it. I noticed—I forget whether the certificates were signed at the time he showed them to me or not. I think they were signed by Mr. Curtis as president, and Mr. Shelton as secretary. That is all the business I ever had with Mr. Louis Zeckendorf in this transaction.

Q. What other matters transpired there—I mean afterwards in July?

472 A. In July of that year, Mr. Curtis came to my office, and said to me: I want you to go down with me and see Mr. Steinfeld. He stated to me that he wanted to see Mr. Steinfeld; that Mr. Steinfeld was claiming as his own the English titles, and the Volkert titles and the 300 shares of stock purchased from Nielsen.

Mr. Ives:

Q. Who said this?

A. Mr. Curtis.

Q. When was this?

A. It was between the 1st and the 15th day of July, 1901. He said certain things further in regard to him. He said: I want you to come down with me to the office of L. Zeckendorf and Company, so I went down with him to the office. Then Mr. Steinfeld said: I claim as my own these English properties; they have been taken in my name and my money paid for them. I also claim the Volkert and Francis properties and the shares of stock—the 300 shares that I bought from Nielsen. Mr. Curtis said: I claim that they all belong to the corporation. In that matter I was acting as attorney for the corporation. Mr. Steinfeld said: My money paid for those things; I paid my own money for them. Mr. Curtis then said: We have been paying Mr. Steinfeld interest on that money. The
473 Silver Bell Copper Company is paying Mr. Steinfeld interest on that money. The Silver Bell Copper Company has done

all the assessment work on all these properties and has been in charge of all the other development work. I was listening to what they had to say. I said to Mr. Steinfeld: You are a trustee, and you have presumed to act as manager and general controller over the president of this corporation. Your knowledge of the values of these properties is gained from your intimate relations with the president of the company, and from the fact that you have assumed to act in this capacity; you cannot make use of that knowledge as to the value of these properties for your own benefit against the corporation. I said: You are a trustee, and now, here is what you can do: You have a right to present all these facts to the stockholders of the corporation; to state what you have done; what you have purchased and the moneys you have paid, and to say to the corporation: You must return to me my money; if you return to me my money on a certain day, I will hold these properties for you as trustee, while, on the other hand, if you refuse to pay me the money, I will hold these properties for myself. And I said: You can't get away from being trustee until you give that corporation and its stockholders an opportunity to have a full investigation as to the—as to the ownership of these claims.

I said I will embody these propositions in writing. Mr. 474 Curtis was there during all this time. I said: Mr. Curtis, this matter must be presented to the stockholders and considered by them. I said to Mr. Steinfeld: You cannot vote that check except as a trustee. There is 539 shares of that *is* L. Zeckendorf and Company stock. Mr. Steinfeld, you cannot vote that partnership stock. Louis Zeckendorf himself cannot vote that stock, because you can't vote something you haven't got yourself. Therefore, I said, I will prepare a form following up this proposition, and which can be sent to Mr. Louis Zeckendorf. You can send it to Mr. Louis Zeckendorf and he can present it to his lawyers. They should come out and investigate all these facts, then if he says he will recompense you, why, all right. Then if he doesn't care to vote to reimburse you, you are a trustee, and no court on earth will hold you other than as a trustee for this stock in your name. Thereupon, I did prepare such a proposition.

Q. Will you please read that proposition. That is your work, is it?

A. Yes, sir; this is my work. It took me a number of days to prepare this. I wrote nearly a year after, and it required my reviewing all the papers and contracts. I had to study the whole thing up again. Then I prepared this document, which document I presented to Mr. Steinfeld and he signed it.

475 Q. Will you please read that proposition?

A. (Witness reads the document.) I wish to state that these figures were put in here by Mr. Steinfeld. I left that part blank and he put in certain figures. I wish also to state that that \$26.60 attorney's fees was paid to me.

Q. Was that done in relation to that proposition? Where was it made? But before you answer, we will offer the copy of that proposition in evidence. It may be marked Plaintiff's Exhibit 15.

The WITNESS: I would like to have the minutes of the Silver Bell Copper Company. After that was prepared—anyway, in outlining this whole thing—it was all outlined first—I said: Now, we will call a meeting of the board of directors, and have Mr. Steinfeld make a formal proposition to the board of directors and the board of directors will call a stockholders meeting. The board of directors held the meeting, and I drew up the minutes. Now these minutes are not in my handwriting, but I dictated them to my stenographer, and had my stenographer typewrite them.

Q. The work is yours?

(Witness reads minutes.)

A. Yes, sir; it is a copy of them. That was the seventh meeting of the board of directors. It was held on Monday, July 15th, at 3 o'clock p. m. It was held pursuant to the call of the president.

Q. This was in the year 1901?

A. Yes, sir.

Q. Thereafter was there a meeting of the stockholders?

A. Thereafter there was a meeting of the stockholders called to consider that proposition, and I was called before the board of directors. It was simply an informal meeting. Either Mr. Curtis or Mr. Steinfeld said that the stockholders' meeting had not been called to consider that proposition. Then I told them to extend the time. Mr. Steinfeld was perfectly willing to extend the time, so the time was extended. I prepared whatever was necessary. I suggested that as the assessment work had already been done by the Silver Bell Copper Company, the consideration had better be with the Silver Bell Copper Company. So I drew up all the necessary papers.

Q. You are now referring to the minutes of July—the minutes of July are now offered in evidence; the minutes of July 15, 1901.

A. Yes, sir; on October 1, 1901, being the day set for calling the special meeting of the stockholders, the board of directors met. The meeting of the stockholders had not been called.

Q. You met with them on October 17th?

A. I did; I prepared the following minutes and the secretary wrote them in the book. That was the eighth meeting of the board of directors of the Silver Bell Copper Company. It was held on October 1, 1901. I will read these minutes. (Witness reads the minutes).

Mr. HERRING:

Q. In the conversation this morning in relation to the properties, as to which you testified, you testified as to a conversation between yourself and Mr. Curtis and Mr. Steinfeld. State whether or not anything further arose in that conversation which you have omitted?

A. Yes, sir; there was other things stated in that conversation which I omitted to state this morning.

Q. Please state them now?

A. Well, this was in July when we made this proposition—when we were talking about this proposition.

Q. July, 1902?

A. In July, 1901. When Mr. Curtis, as I before stated,
478 requested me to go down to Mr. Steinfeld, as I have already testified, Mr. Steinfeld said to me: It was my money—I used my own money in buying these English titles and the Volkert and Francis titles. I says: Well, I never knew that before. The services I rendered in that matter I did not render for you. I would not try to get for any one of those mining claims surrounding the Old Boot mine, so that you could freeze out the men associated with you. I am acting as the attorney for this corporation. It would be highly unprofessional for me to act for you in this matter, as that is the proposi-i-n upon which the very life of this corporation depends. I said I was acting in what I did for this corporation. Now, Mr. Curtis, at that conversation, called my attention to the fact that the agreement with Mr. Nielsen—the agreement with Mr. Nielsen had been signed over a year b-fore, and my recollection was not very fresh in regard to the conditions of the agreement. He called my attention to the fact that the agreement with Nielsen was signed by him—that is by Steinfeld—for the corporation. Mr. Curtis had signed as president of the Nielsen Mining and Smelting Company. So I said to Mr. Steinfeld: Now, this contract as to this, you cannot, under any circumstances, claim the Nielsen stock as your own; that you must hold as trustee for this corporation; even if they didn't
479 pay you back. That in any event, whether they pay you back or not, this 300 shares of the Nielsen stock you would have to hold as trustee for the corporation. But, I said, of course you can hold that for the security for the money that is due you. Now, as I already stated this morning, Mr. Curtis knew that these properties were purchased by Mr. Steinfeld for the corporation, and in what he stated was endeavoring to show this fact. When I explained the legal aspect of the thing to Mr. Steinfeld, he accepted my views as to the fact that he was a trustee; and therefore it was that that proposition was drawn up. This morning also, I stated that I would look up the date of that deed. It was November 23, 1901. It was Steinfeld to the Mammoth Copper Company.

Q. Now, after this, having drawn this agreement which did not disclose the intimate facts between the parties, was there any further agreement drawn in relation to this matter?

A. Now then, there was another agreement; I will designate it as a private agreement—a guarantee agreement. Mr. Goodrich and Mr. Robinson, the attorneys for the Imperial Copper Company, desired that we guarantee the title which was to be given by Mr. Steinfeld and the Silver Bell Copper Company. It was to be for one year after the purchase price was paid. Well, I claimed that it was to be for one year, but they said it must be a guarantee for two years.

How did we know but what somebody would come up and
480 claim these mines? I went to see Mr. Steinfeld and he said that he would not give a guarantee for two years. Mr. Goodrich said, when I communicated that fact to him: If that is so, then as far as we are concerned this transaction is at an end; we are not going to pay \$515,000.00 for property and at the end of a year have

somebody come in and claim it. We talked about that for quite a time. It was very serious. At last, after thinking over it all night, I said: Mr. Goodrich, an idea has suggested itself to me that will obviate this difficulty. I said: You select the mines that you want patented and I will suggest to my people that they guarantee the title up to the time the final receipt is issued. Now, the jury will not understand this. Now, in patenting a mine—in making an application for a patent—some of these gentlemen know all about it—there is a period of time in which the application must be published; there must be a notice published in the paper and a notice posted on the claim; any person can file an adverse claim in the land office within sixty days and if they do not file the adverse claim within the sixty days they are barred by the statute of limitations, and do not have any right. Every man who claims an interest in the mine for which a patent is applied must produce his adverse within sixty days. At the expiration of the 60 days' posting on the claim, the applicant pays at the land office usually about \$100 for each claim and 481 gets what is called a Final Receipt. That final receipt is just as good as a patent. So I suggested that to Mr. Goodrich. I said: Let your people name the claims that they wish patented out of these forty-eight, and Mr. Steinfeld will guarantee you against all loss up to the time the final receipt is issued. As to the other claims the guarantee will be just for one year. Mr. Goodrich seemed very much impressed with the idea and bore that suggestion to his people.

Q. And you bore it to yours?

A. Of course, I had to bear it to mine. Mr. Steinfeld was the owner or representative of the Silver Bell and Mammoth Copper Companies. I conveyed the information to Mr. Steinfeld—

Q. Who was then the vice president of the Silver Bell Copper Company?

A. Yes, sir; Mr. Steinfeld was then the vice president of the *the* company. That solution of the problem was accepted and we drew up the guarantee on that basis. Mr. Goodrich presented the names of twenty-one *mined* to be patented and to be paid for by the Imperial Copper Company. We had a number of drafts of this guarantee agreement. Mr. Goodrich, of course, wanted to protect his people on his side, and I desired to protect my people as well. At

482 last we adopted this guarantee agreement. It was the collaboration of the work of both of us, and it was signed. I have a copy of the instrument that was finally passed upon and adopted.

The WITNESS: Mr. Curtis was claiming just what I claimed. I have not said what Mr. Curtis said, because I wished to obviate the necessity of taking up more time than necessary. I have said everything Mr. Steinfeld said because — was not my client in the matter at all. Mr. Curtis took the position himself that Mr. Steinfeld held those mines as trustee. When Mr. Curtis, in July, 1901, came to my office and said that Mr. Steinfeld was claiming that he had paid his own money to buy in the claim of Francis and Volkert; that he had \$1,000 to pay to Lewis and that he was the owner of these claims,

I said: Well, he is not. I said that is not correct. He said: You come down with me. I went down with him to see Mr. Steinfeld. Mr. Curtis took the position that his corporation—the corporation of which he was president, was the owner of those claims; and he said when I went down there: I want to hear what Mr. Steinfeld has to say. The whole matter was considered. Mr. Steinfeld presented his view of the matter, and I have detailed what he said. He said that his money bought the property and it was his. Mr.

483 Curtis then presented what he had to say. He claimed that the Silver Bell Copper Company had been paying Mr. Steinfeld interest on this identical money; that Mr. Steinfeld had paid it out for the purchase of these English claims—the Volkert and Francis claims, that they were purchased for the money and that their books showed it. That he, as president, had taken possession of these English claims and had done the assessment work on them—had paid for the assessment work and had charge of the properties from that date. He was urging the rights of his corporation to the claims. I stated what the law was and what the position of the parties was, because I was in a position to do so. I laid down the law on the subject and told them what they must do. That is what occurred. I drew up this paper and Mr. Steinfeld signed it. I said: Mr. Steinfeld, if the corporation—the Silver Bell Mining Company does not want to assume the obligations that you have assumed—the obligations were to do the assessment work—if the corporation don't try to repay you, and assume these obligations, let the corporation say so. I will draw up a paper from the corporation to you in which I will set forth the trust relation and you will hold these properties without any question, as trustee.

Q. I want it read.

Q. Is that all of the minutes?

A. Yes, sir. They are signed by J. N. Curtis, president, and Ralph K. Shelton, secretary.

484 Mr. HERRING: We offer these minutes in evidence.

Admitted in evidence and marked plaintiff's Exhibit 27.

The WITNESS: I want to state that my best recollection is that before I drew these minutes (May 20, 1903) I endeavored to draw up the agreement referred to in here, settling what should be done with the \$515,000.00. I drew up one very long and elaborate agreement. I put in at least two days on this agreement. I presented it to Mr. Steinfeld and Mr. Curtis, and Steinfeld thought it was too elaborate. Then I drew up a more simple agreement in regard to the disposition of the proceeds referred to at that meeting. My recollection is that I drew up this agreement before I drew up the minutes.

Q. Was that agreement executed?

A. Yes, sir.

A. There was a great deal of conversation between Steinfeld and Curtis and myself as to what indemnity Steinfeld was to receive for guaranteeing the titles. I said that Mr. Steinfeld had assumed

485 a great big obligation and a heavy responsibility in guaranteeing these titles. I said it was nothing more than right and proper that the purchase price, after paying the necessary debts, should remain in the hands of Mr. Steinfeld as trustee, to indemnify him against loss in the event the titles should be taken—or that damages should arise by virtue of any of these titles not being good in other words, the money should remain in Mr. Steinfeld's hands as trustee, to prevent loss, until the expiration of the guarantee, and I strongly urged that they should be done, because I said Mr. Steinfeld was fully entitled to it for the responsibility he was assuming. It was to cover that, that I drew this long agreement. Mr. Steinfeld also wanted this done and Mr. Curtis consented to it. I drew up this agreement on the 20th of May, 1903. It was between the Silver Bell Copper Company and the Mammoth Copper Company.

Mr. HENRY: Is this the agreement which was executed?

A. Yes, sir.

(Witness reads agreement.)

Mr. HERRING: Admitted in evidence and marked Plaintiff's Exhibit 28.

486 The WITNESS: Now, I wish to state that I devoted two or three days of very hard work to drawing up and drafting this agreement, covering the same proposition, according to my own views of the matter. I have the agreement here; it was not accepted.

Mr. HERRING: How many pages—typewritten pages were there of that agreement or copy?

A. There are nine typewritten pages, and appended to it are copies of other agreements. It was submitted to Mr. Steinfeld and Mr. Curtis. Mr. Steinfeld objected to it as being too long and too elaborate. Thereupon I did my best to draw up something simpler. That is what I drew up myself. It is a part of the work I did.

Q. And the appendix?

Those papers are a part of the work.

A. They are a copy of the guarantee agreement.

Mr. HERRING: We offer that in evidence as a part of the work performed.

Mr. HERRING:

Q. Now proceed, Mr. Franklin?

487 A. Well, now the next piece of work that I did was on or about the 29th day of May. I had a meeting of the stockholders on the 20th day of May, or about that time. I also had a meeting of the board of directors of the Mammoth Copper Company to ratify everything that was done. I prepared the minutes of these meetings and suggested what should be done. Those minutes were all in my handwriting.

Mr. HERRING: Read them.

A. This meeting of the board of directors of the Mammoth Copper Company was held on May 20th, 1903. (Reads minutes). They are signed by Albert Steinfeld, president.

Q. Were those minutes prepared by you?

A. Yes, sir; I prepared them.

Mr. HERRING: They are offered in evidence.
Admitted.

Q. Was there a stockholders' meeting?

A. On the 20th day of May, there was a stockholders' meeting of the Silver Bell Copper Company. I was present and drafted the resolutions and made such recommendations as were necessary. The following are the minutes of the meeting.

Mr. HENRY: I understood you, Mr. Franklin, yesterday that the agreement of the Silver Bell Copper Company and Albert Steinfeld and the Mammoth Copper Company, which you prepared, expressed in detail what it was that Albert Steinfeld wished to protect him against the guarantee to turn over these properties to the Silver Bell Company?

A. No; that is not correct; it was what I thought was necessary to protect Mr. Steinfeld for the obligation he had assumed and also, perhaps, he should acquaint Mr. Louis Zeckendorf.

The WITNESS: I wish to state that I drew up that paper for two purposes. One was to absolutely protect Albert Steinfeld for the obligations he had assumed under this guarantee agreement, for the various sums that had to be paid. The second, to present in such form that Mr. Louis Zeckendorf would be absolutely acquainted with all the details in the matter.

Q. Albert Steinfeld contended that he was entitled to that protection, didn't he?

A. He not only contended that he was entitled to it, but I very strongly urged it.

Q. This deed covered all of the options that Steinfeld and yourself thought were necessary to protect him?

A. I only say that because I drew that up myself. It took me two or three days. I took it to Steinfeld. The next I heard from Steinfeld was that he said this was too long and too voluminous; he said that he wanted something simple; that something a good deal shorter would state what he wanted. A little different from this I drew another agreement. I think the main point was no different from the original that I had drawn. We talked a good deal about that before.

Q. Was there any of the provisions essentially different in any way?

A. No, I don't think they were.

Q. Now, before this was drawn you say you talked to Mr. Steinfeld about it?

A. Yes, I talked very extensively with him about it. We had very many consultations on the subject. It was not so much what I desired but it was a question of getting the protection to which I thought he was entitled. We were both trying to accomplish a given end, and that was to absolutely indemnify him against loss, he having assumed very serious obligation in these matters. The Burnett correspondence was absolutely in Albert

Steinfeld's name and it looked as though he was personally responsible to Burnett. I desired to have the Silver Bell Company assume all the liability, whatever it was, between Steinfeld and Burnett.

Q. He so desired also, of course?

A. Certainly. He had entered into a number of negotiations for the sale of this property previous to this time. He had had some trouble with Lewis and others in regard to some of these claims, and in the matter of commissions, and I desired to indemnify him against any claim whatever.

Q. And he, also, wish- that?

A. Certainly.

Q. After he had read this over he wanted a guarantee in some definite form, isn't that so?

A. I don't think that he said that. I think he said he wanted to be indemnified.

Q. You think he said that he didn't want to go on with this transaction unless he was indemnified?

191 A. Yes; in other words, the main objection that he had to this agreement was that it was too long. As I say, that was the only objection that he made to me. He said that this was much longer than was necessary and he wanted something shorter.

Q. In drawing that up, your intention was—you got the substance of this agreement—

Mr. HERRING: I think we will object to this.

The WITNESS: Now, I wish to state further in relation to this. I had my own opinion and expressed it to Mr. Steinfeld as he was the man to be indemnified; of course, it was for him to say what he wanted in the way of a paper.

Mr. HENRY: I think you are exactly right on that. The idea is that this agreement resulted from your suggestion and conversation.

A. Well, anyway, the agreement was signed.

Q. The long one?

A. No, sir.

192 Q. And you claim that the agreement — was signed was the result of conversations with Steinfeld, with Steinfeld on this subject?

A. Yes, sir; except to one point which I think I omitted. That was about any dividends being declared. I don't remember whether Steinfeld said anything about that.

Q. Now, then, in drawing up this shorter one, you endeavored to state substantially the same thing in shorter form?

A. No, I endeavored then to draw up what Steinfeld wanted. I could not put in the substance of that long agreement in two pages. I simply drew up what Steinfeld wanted.

Q. You understood that he wanted everything that was satisfactory in the long agreement, didn't you?

A. Now, let me explain. I will tell you just what was said, as near as I can recollect it. Mr. Curtis and Mr. Steinfeld both were present after this purchase price had been paid. I think it was then that we discussed and considered what amount of security Mr. Stein-

feld should have to secure him properly for this guarantee agreement. It may be that we discussed this before the purchase price was paid. We discussed it off and on for a week. Now, having gotten the view of what Mr. Curtis and Mr. Steinfeld agreed to, I endeavored to embody that in that first draft of agreement.

Q. And to the best of your ability you did embody what they agreed to, did you?

A. What they agreed to was merely this: that \$115,000 cash should go to the corporation to pay up certain matters; that the four notes should go to Mr. Steinfeld and should be retained by him as trustee as an indemnity to secure him against loss and to pay the expenses incurred by virtue of the guarantee agreement and any other obligation which he had personally assumed. Now, to cover that, I wrote that long agreement and submitted it to Mr. Steinfeld. His objection was that it was too elaborate and too long. He wanted something shorter.

Q. And to carry out his individual ideas?

A. What I was driving at was the protection of all parties?

Q. Well Steinfeld, I mean.

A. Yes, sir; Curtis consented to that. Curtis was just as desirous as Steinfeld that he should be protected. Now I wish to say this: I have already stated in my first direct examination that we had a good deal of difficulty, Mr. Goodrich and myself, in reaching this matter of the guarantee agreement; we went into the details and all that, and discussed with Mr. Steinfeld, that is, I did, about the whole transaction. It may be that before Mr. Steinfeld signed the guarantee agreement at all, it was then arranged that he was to be indemnified in this way.

Q. Now, isn't it a fact, Mr. Franklin, that Mr. Goodrich insisted on having Steinfeld's individual guarantee?

A. Mr. Steinfeld had in his option to Mr. Beaton agreed that he would give a guarantee and Mr. Goodrich insisted on that option being carried out. Our only—

Q. You advised from your knowledge of the condition of these titles—you advised Mr. Steinfeld as to the risk that he was taking in making that guarantee?

A. I did.

Q. So that he knew that there was considerable risk about the guarantee; he knew that from your advice?

A. Well, there were certain obligations; the guarantee took with it certain obligations. I told him that some of these claims were located by parties who claimed that their locations were prior to the claims of our people. I said the title—I did not say your title—well, whatever I said, the company's title is good.

Defendants rest.

S. M. Franklin.

S. M. FRANKLIN being called by plaintiff in rebuttal testified as follows:

I remember the date when the first conversation occurred between Mr. Steinfeld and myself as to his holding any property in trust for the Silver Bell Copper Company. It was after June 1st, 1901. The date was sometime between the 1st and the 15th of July, 1901. It was a few days before I drew up the proposition of July 15th, 1901. The conversation was first with Curtis and then Curtis and myself went to the office of L. Zeckendorf and Company and saw Mr. Steinfeld. That was the first conversation I ever had with Mr. Curtis on that subject.

A. Mr. Curtis came to my office—I can only give the substance of the conversation, but he said to me, I think he first asked me to whom the English claims belonged—I think we always called them the Silver Bell mines. He said that Mr. Steinfeld is claiming that they belong to him. I said, well, they don't; he said Mr. Steinfeld said he paid his own money for these claims and therefore they are his; and I wish to state that it is difficult to separate the conversation right then and the conversation a few minutes afterward
496 when he went down to see Mr. Steinfeld.

I told him that that was a new one to me, that I did not know Mr. Steinfeld had used his own money; that it didn't make any difference; that Mr. Steinfeld's relations towards the corporation were such that he could not acquire those properties even if he used his own money and held them for himself, as against the corporation.

In this connection I wish to state I knew all about the—a vast deal about the acquisition of these mines, and had had previous conversations with Mr. Curtis in regard to the acquisition of those mines, and the opinion I was giving to him was largely based upon my own knowledge at that time. And he said, will you go down and see Mr. Steinfeld and tell him this. I said, certainly; and so I went down with him right then and there to see Mr. Steinfeld, and when we got into the office he said here is Mr. Franklin.

I have forgotten now whether he made the statement of his side, or whether Mr. Steinfeld made a statement of his views first, but anyway, Mr. Steinfeld said, that he used his own money in acquiring the titles to the Silver Bell mines and that he claimed those mines as his own. Mr. Curtis said that the money was a loan to the corporation; to the Silver Bell Copper Company; he said we have been paying

Mr. Steinfeld interest on his advances; I have taken charge
497 myself as president of the Silver Bell Copper Company of these mines; and from the time that Mr. Steinfeld got them and I have had charge of them as president of the Silver Bell Copper Company; the Silver Bell Copper Company did the assessment work on them for the year 1900; and I have forgotten now whether he said other work or not.

Now, when they had both concluded making their statements, I said to Mr. Steinfeld, your relation with this corporation is such that

you would be held by any court on earth as a trustee; I says, in the first place, these mines in the beginning of 1900, the works at these mines were closed down for the purpose of enabling you to acquire these properties; the information you got as to the value of these properties came from your connection and relation with this corporation. I said, you have assumed to be the general manager of the corporation; you have been the controlling influence over the board of directors; you have run its president and directors; you have been more than its manager, or words to that effect; and, therefore, in that fiduciary relation which you have occupied towards that corporation and the knowledge which you have acquired, I says any court on earth will hold you a trustee as having acquired these properties for the benefit of this corporation.

Then after some further conversation, I said this; I said
498 I will prepare now a proposition which you can submit to this corporation. Mr. Curtis knows all about this thing; Mr. Louis Zeckendorf don't know anything about it. I said I will draw up a proposition which you can submit to this corporation and call the stockholders' meeting and have them vote on it. Now if all the stockholders will consent that you shall hold these properties and you release the corporation upon advances made, I will then draw up the resolution which will terminate your trusteeship. While, on the other hand, if the corporation will pay you the money which you advanced within such reasonable time, you can get your affairs straightened out. Now I think I am quite sure that at the same time I told him that under the present conditions, taking the statement of Mr. Curtis that the money was advanced as a loan, I said, you hold these properties simply, although you are a trustee—it is like a mortgage you could not even collect your money without foreclosing. I says, we will simplify this thing and put it in shape. Then I also said to him further, I said now, the shares of stock stand in the name of L. Zeckendorf and Company; I said that I knew that the majority of the shares, 529, stood in the name of L. Zeckendorf and Company. I told him at a stockholders' meeting, that is to pass on the proposition, you cannot vote these shares; Louis Zeckendorf will have to
vote them; I said, in order that he can be fully advised and
499 know what he is doing I will draw up a proposition, embodying the Nielsen agreement and the Volkert-Francis agreement, and so on, so that he will have an opportunity to investigate the thing, there before he votes the L. Zeckendorf and Company stock. That seemed to be all satisfactory, in my opinion upon that matter and was absolutely accepted, my opinion upon that matter. I then went to work and drew up that long proposition of July 15th, and devoted quite a good deal of time to it, and in that proposition—and I wish to state that with the exception of one amount, the amounts of money were typewritten in, but there others were blank.

I would like to look at the minute book to refresh my memory (witness looks at the minute book of the Silver Bell Copper Company).

I prepared and had typewritten, the form of minutes which were to be written up by the corporation, that is to say by the directors,

and both instruments, the proposition of July 15, 1901, and the minutes of the meeting, as I say, and I gave—I might have given them to Mr. Steinfeld or to Mr. Curtis, and I might have given the form of minutes to Mr. Shelton. I did not myself copy the minutes in the book, but the minutes are in here, a copy of my typewritten form, which I gave either to Mr. Curtis, Mr. Steinfeld or Mr. Shelton.

Now, at the same conversation came up the matter of the 500 300 shares of the Nielsen stock. I remember distinctly asking Mr. Steinfeld to produce the agreement of June 29, 1900, between the Niensens, the corporation and himself about that stock, and I read it at that time again, although I had drafted it I had forgotten about it and I read it again.

I also asked him to let me see again the certificate of stock book with the stub upon which Mr. Zeckendorf had written, that these shares were held by Albert Steinfeld as trustee. I had seen that before and that was presented to me also. We considered that matter and I then said to Mr. Steinfeld, in any event you are a trustee as to this stock, even if a thousand dollars which you have advanced is not repaid you. Now, as to that thousand dollars I wish to state I think it was at that time, most likely at that time, that Mr. Steinfeld said to me that he had paid one thousand dollars to Lewis, and the Niensens for the Clarence mine and for the deed which was executed by Lewis and the Niensens, and a thousand dollars to the Niensens on account of the stock purchase. Now, that is my recollection that I said to him, even if this thousand dollars is not returned to you, nevertheless, you are a trustee as to that stock and Mr. Zeckendorf knows all about that stock transaction. I knew that. I knew that in a conversation with Mr. Zeckendorf and at the time that he 501 showed me the entry he had made upon the stub some months previously and therefore it will be noticed that in that proposition of July 15, 1901, in the bottom of it is the language used there in regard to that stock. I put it in there for that reason, to the effect that in any event he would hold that as trustee, unless the company wished to release him. I left right after that on my summer vacation, shortly afterwards.

Sometime, either the latter part of September, 1901, which was shortly before the entry of the minutes of October 1st, 1901, that I had another conversation, and I think that was, I know it was, with Mr. Steinfeld; whether Mr. Curtis was present or not, I do not now recall.

I think Mr. Curtis was present and I think Mr. Steinfeld said that the proposition of July 15, 1901, had not been consented to by Mr. Zeckendorf, or else that Mr. Zeckendorf was not going to come to Arizona during that fall—I forgot to state in our previous conversation why the date of the acceptance of the proposition was set for the 1st day of October, 1901, because it was stated by Mr. Steinfeld that Mr. Zeckendorf was expected to be in Tucson sometime before October 1st, 1901. Mr. Zeckendorf did not come here, so Mr. Steinfeld stated that Mr. Zeckendorf was not coming out and that he wanted to have this matter extended for one year. Then I suggested myself 502 to have this straightened out to base this proposition upon the doing of the assessment work for the years, for either per-

forming or paying for the assessment work for the years 1900, 1901, and 1902, I mentioned particularly 1901 which had passed. The time was extended then one year; it was Mr. Steinfeld's suggestion as to the time, at that time he said to me that he had not sent the proposition of July 15, 1901, to Mr. Zeckendorf.

Well, I think he said that Mr. Zeckendorf was expected out here sometime before this meeting was going to be held so he could investigate things for himself.

Now, I wish to state, that in the first conversation I have already stated, that I said very distinctly that Mr. Zeckendorf would have to vote the Zeckendorf stock, and would have to know what he was going to do, would have to be thoroughly apprised of what he was going to vote on before the action, and in my opinion, would be binding.

I stated that as this was a proposition from Mr. Steinfeld himself, that he could not vote on it, that is, he could not vote the stock of L. Zeckendorf & Co., as the managing partner, but L. Zeckendorf would have to vote the stock which stood in the name of L. Zeckendorf & Co.

503 Q. The letter has been in evidence, directing your attention to that date, Mr. Franklin, May 19, 1901, had you at any time prior to that date had any conversation with Mr. Steinfeld or Mr. Curtis with reference to his trust relationship to that property of his holding that property in trust?

A. I cannot be sure about that for this reason; that before these properties were acquired, I had a good deal of conversation with Mr. Curtis about them and after, when I organized the Mammoth Copper Company, and during all that time I had a good deal of conversation with Mr. Curtis.

With Mr. Steinfeld I had a good many conversations, but the questions of trust I have no recollection of that question ever coming up, until this particular time when I drew up this proposition.

Q. Now, what I want to know Mr. Franklin what advice or statement, if any, you had made to Mr. Steinfeld prior to that time as to his holding that property in trust, if any?

A. No recollection of any statement other than the one I have testified to. I wish to state this, I always having in my own mind the relationship that he occupied with regard to those properties might have as a matter of ordinary conversation, I have
504 always referred to him as holding them in trust, but there was nothing that I recall now.

He and I did not have any discussion about the matter prior to that time in which he disclaimed holding for any trust. Mr. Curtis, Mr. Steinfeld and myself did not at any time prior to May 19, 1901, have any discussion wherein Mr. Steinfeld made any statement claiming to own these properties in his own name for himself and his own benefit. My first discussion was the one I have testified to which must have been shortly before I drew up that proposition.

I will state my recollection of the time and the only time, was this time in July that I have referred to, and that was very distinctly impressed upon my memory, and I wish to state in regard to the date of that conversation, I simply remember the date on account of my

recollection that shortly after that conversation I drew up the proposition of July 15th. Mr. Steinfeld did not repeatedly during the months of March, April, May or June or at all request me to draw that document. Neither Mr. Curtis or Mr. Steinfeld said anything to me about drawing up that document or any document bearing on that subject. I suggested that document myself and I drew it up within a very few days after I made the suggestion, and in this conversation Mr. Curtis made mention of the fact that interest
 505 had been paid on the account in my presence down there in the bank office.

The minutes appearing on pages 24 and 25 of the minute book were prepared either on or before the 14th of January, 1901, and I can tell why.

Cross-examination by Mr. HENEY:

I acted as attorney for L. Zeckendorf & Co. from some time in the latter part of the eighties down to 1903.

In the course of my long service as attorney for L. Zeckendorf & Co., I have had a great many conversations with Albert Steinfeld upon business. He consulted with me every week almost during the time I was employed, when he was in town, one or more times during the week.

During the time that the Nielsen Mining and Smelting Company was running, I had a great many conversations with Albert Steinfeld from the time it was organized down to the time of the sale May, 1903, with relation to the affairs of the company.

Q. Would you be willing to swear that because you don't remember a particular conversation as having occurred at a particular time with Albert Steinfeld that it never occurred? That is on a subject
 matter that you had talked about with him at some time.

506 A. Well, if my attention was directed to the time, place and what was said, and the circumstances referring to it, possibly I could be certain about it—possibly I could not.

In all of these conversations which I had with Albert Steinfeld and which I had with Curtis which related in any way to the purchase of mines which stood in the name of Francis and Volkert, and those that are known as the English group, I was representing the Silver Bell Copper Company as its attorney and those particular conversations in relation to these matters I most decidedly did not consider myself as the attorney for Albert Steinfeld personally, and that covers the contract of May 20, 1903, which was executed between Steinfeld and the Silver Bell Copper Company, and which covers the so-called option of July 15, 1901, and which covers the conversation in regard to the Nielsen 300 shares of stock.

I do not feel particularly unfriendly toward Albert Steinfeld at the present time. I have not expressed an intention to get even with him. I have nothing to get even with him for. I will state that my relations are not by any means as cordial as they were necessarily.

I had conversations and consultations with Mr. Steinfeld and with

Mr. Curtis in regard to the Francis and Volkert titles from
507 the time I commenced to try to get them which was in the
early part of 1900 continuously up to the time that they were
acquired which was in the latter part of May, 1900. I attempted to
get those titles. Curtis requested me to do so, requested me to get
Mr. Steinfeld to get them. He was af-er me a number of times to
get Mr. Steinfeld to acquire those properties.

The smelter was shut down at that time; the mine was shut down.
The smelter was shut down the beginning of 1900.

I want to say that Curtis told me that this corporation was in debt
and he also stated that they were making a great deal of money each
month; but their status I did not know.

From the time they started in, from the inception of the com-
pany, they were indebted. I knew they were indebted. I knew they
were indebted when they started, because they had assumed an in-
debtedness; how much they owed I did not know.

Mr. Curtis did not urge me in regard to getting the Volkert titles.
I wish to correct my testimony. He requested me to explain the
necessity to Mr. Steinfeld, to urge him to start the machinery in mo-
tion for the acquisition of the Silver Bell group of mines. He told
me that he himself had urged Steinfeld to get these mines;
508 but that Steinfeld was very lukewarm in his efforts.

Q. Did you advise Mr. Steinfeld that if he bought these
mines at that time he would be a trustee for the Silver Bell Copper
Company at the time he was negotiating for the Francis and Volkert
titles?

A. I had no conversation as I recollect of, on that subject what-
soever, at that time.

I knew that Nielsens owned 300 shares of the stock in the corpo-
ration at that time. I knew the company was in debt, but whether
they had funds or not I did not know.

I knew that L. Zeckendorf & Co., were making advances or giving
credit to this corporation, and I presumed, I believed that Mr. Stein-
feld in any advances he was making for the acquirement of those
titles and that stock, was making the ordinary advances of L. Zeck-
endorf & Co.'s, money, and I did not know that he claimed it as his
own money until the day Mr. Curtis came and told me.

Curtis told me in the presence of Steinfeld that Steinfeld had
loaned the money to the Silver Bell Copper Company to make this
purchase, and that the company had paid him interest on it. That
is what he said.

509 Q. And you told him that if that was a fact, Steinfeld held
them as trustee?

A. I told him that Steinfeld was a trustee anyway on account of
his confidential relationship with his corporation.

I never discussed the matter with L. Zeckendorf at all. I do not
know whether he was here in 1902. I had no conversation with
Zeckendorf on the subject of whether Steinfeld had loaned that
money to the Silver Bell Copper Company. As I had no conversa-
tion with Zeckendorf on the subject, of course, I did not tell him that
Steinfeld on my advice had made a proposition to the company.

I will not swear that I did not have a talk with Curtis prior to May 19, 1900, in which I stated to him that Steinfeld was a trustee for these properties.

I always considered him a trustee, and unless you can direct my mind to some particular conversation, I have no doubt if I mentioned the subject I always took the same view that he was a trustee. If he talked with me on that subject at all I told him that.

I will not swear that I did not tell Albert Steinfeld prior to May 19, 1901, that he was trustee of the Silver Bell Copper Company as to these properties that were in his name and in the name of the Mammoth Copper Company. I will simply say if I had any conversation—I do not recollect any on that subject—that I undoubtedly told him he was a trustee.

When Steinfeld returned from Europe he simply told me he had paid so and so for the mines and laid no stress on the fact that the company had paid it or L. Zeckendorf & Co. He said he paid it to these people.

Q. Will you be willing to swear that he did not tell you in December, 1900, that he personally paid the purchase price of those English titles?

A. As near as I can recollect, he simply told me he had paid certain amounts of money.

Q. I want to know if you will swear positively that he did not tell you that he, Albert Steinfeld had personally paid the money that was given as consideration for the English titles?

A. I won't be positive about a conversation that length of time, except as to my recollection of it. I wish to say right now. There was no stress or point made as to whose money it was.

The first time I saw the stub of the certificate No. 5 and the endorsement on the back, was either in January or February, 1901.

Mr. Louis Zeckendorf first showed it to me. I happened into his office. The book-keepers were present. I do not remember that Albert Steinfeld was there. Zeckendorf was right near his safe as I came in and he pulled out this book and he showed me this and asked me whether that was in correct form, and he showed me the endorsement on the stub at that time and asked me whether that was all correct. I told him that I thought it was, and that was all there was to it.

I thought then that Mr. Steinfeld held those shares of stock as set forth in here on this memorandum of the stub. That was my opinion.

I did not suggest to Mr. Zeckendorf that Albert Steinfeld ought to sign that endorsement. I do not remember that Albert Steinfeld was in San Francisco at that time. I did not go to Steinfeld right after that—right after Zeckendorf had talked to me—and talk to him about it. I do not recollect any particulars about this endorsement until July, 1901.

The only time I had seen this endorsement on the stub before this talk in July was when Zeckendorf showed it to me. I am not willing to swear positively that I did not have a conversation with Steinfeld prior to July or prior to May 19, 1901, about that certificate. After

the subject was brought up I told him he was a trustee; that was my opinion—undoubtedly I told him that if the subject was brought up.

512 Q. Now, then, the principal grounds upon which you base your claim for the \$51,500 in the suit you have against the Silver Bell Copper Company, are, First: that you aided in securing the titles to what are known as the Silver Bell group of mines; and second, that you saved those properties to the Silver Bell Company by requiring Albert Steinfeld to recognize the fact that he was a trustee for the Silver Bell Copper Company for these properties. By so doing, and advising him—is not that true?

A. Well, that is a part of the service for which my suit is brought. Undoubtedly those two are the principal grounds upon which I base it. Those are the two most important items of service as I consider.

I wish to state this—the most important ground was the acquisition of the claims. My service in the acquiring of those claims—the titles, and what I did in connection with this trusteeship matter; but the principal thing was in getting the mines and in getting the mines, I acted for the benefit of the Silver Bell Copper Company.

L. Zeckendorf Recalled.

L. ZECKENDORF being recalled testified as follows:

513 I heard Mr. Steinfeld's testimony with reference to his conversation in New York with me with reference to his having purchased those English properties.

We had a conversation about the Silver Bell and his trip to Europe. Mr. Steinfeld said he met the directors of the Ray Copper Company in London, and he agreed to advance them \$75,000 to get them out of debt. He did not say a single word about his having purchased the claims that we are now calling the English mines. He did not tell me that he had purchased them. He never mentioned it, not a word of it; not a single word was said in that conversation, directly or indirectly, which bore upon his having negotiated for the purchase of that English group of mines.

Q. Did you read the minute book of the Silver Bell Copper Company in 1902?

A. Yes, sir.

Q. You read the minute book of the Silver Bell Copper Company?

A. I did not understand you—No.

Q. Your hearing is not very good?

A. Not very good.

Q. Did you read the minute book of the Silver Bell Copper Company in 1902?

514 A. I did not.

Cross-examination:

I received a letter from Mr. Steinfeld just before he went to Europe telling me he was going over there to try and get these

English mines. I had several letters from him telling me that he thought it was very important to get them. When he came back I had a talk with him. I know that the Silver Bell Copper Company was largely indebted to the firm. I did not ask him anything about whether he got the English mines or not.

Plaintiff rests on rebuttal.

Albert Steinfeld Recalled.

ALBERT STEINFELD being recalled by defendants, testified as follows:

Q. Did the Silver Bell Copper Company have any bank account anywhere except with L. Zeckendorf & Co.?

A. It *was* no bank account with L. Zeckendorf & Co. except a cash account. They had another account upon which they drew checks.

515 They never had any cash on hand at any time. They were always largely indebted to Zeckendorf & Co. and there was never any deposit upon which they drew checks on Zeckendorf & Co. Their account was always overdrawn.

Articles of Incorporation of Nielsen Mining and Smelting Company.

Know all men by these presents: That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation, under the laws of the Territory of Arizona, and we hereby certify:

I.

That the names of the aforesaid incorporators are: Carl S. Nielsen, John N. Curtis, and Ralph K. Shelton.

II.

That the name of the said corporation is Nielsen Mining and Smelting Company, and that its principal place of transacting business is the City of Tucson, County of Pima, Territory of Arizona.

516

III.

That the general nature of the business proposed to be transacted by the said corporation is the locating, buying, selling, leasing and working of mines and mining claims; building and erection of smelting and other reduction plants; buying, selling, and reducing ores and metals; also the carrying on of a general merchandise business and keeping boarding houses; also to buy, sell and lease lands, to be used in or about the mining business, and to erect buildings thereon; and generally to do anything necessary or incident to the business of mining and reducing ores and metals.

IV.

That the amount of the capital stock of this corporation shall be twenty-five thousand dollars (\$25,000), divided into one thousand (1,000) shares of the par value of twenty-five dollars (\$25) each; and that the time when, and the conditions upon which the said capital stock is to be paid in, shall be regulated and provided for by the board of directors of this corporation.

V.

That the time of the commencement of this corporation shall be the 14th day of January, 1899, and the termination thereof shall be twenty-five (25) years from this date.

517

VI.

The affairs of this corporation shall be conducted by the following officers, to-wit: by a board of three directors, one of whom shall be the president, and one vice-president; and one shall be treasurer of this company. The president or vice-president may also be treasurer. The said board of directors shall be elected by the stockholders of this corporation on the second Monday of January in each year, and shall hold office until their successors are elected and qualified; but until the first annual meeting of the stockholders, John N. Curtis, Carl S. Nielsen and Ralph K. Shelton shall constitute the board of directors of this corporation.

The board of directors is to elect out of its own number the other officers hereinbefore mentioned. There shall also be a secretary and such other officers as the board of directors may deem necessary, who shall be appointed by the board of directors.

VII.

The highest amount of indebtedness or liability to which this corporation is, at any time, to subject itself, is the sum of twenty-five thousand dollars (\$25,000).

The private property of the share holders of this corporation is to be exempt from the corporate debts.

518 In witness whereof, We have hereunto set our hands and seals this 14th day of January, 1899.

CARL S. NIELSEN.
J. M. CURTIS.
RALPH K. SHELTON.

By-Laws.

Article I.

The directors shall be elected by the stockholders at the annual meeting of the stockholders on the second Monday of January in each year, and shall hold their office until their successors are elected and qualify. Their term of office shall begin immediately after election.

Article III.

The board of directors shall have the power (sub-division IV) to incur indebtedness, provided, however, that no indebtedness in excess of the sum of \$25,000 shall ever be incurred.

Article XIV.

The annual meeting of the share holders shall be held at Tucson, Pima County, Arizona, on the second Monday of January in each year.

519 There is no provision that a director must be a stockholder.
No annual meeting of stockholders was held on the second Monday of January, 1900.

The first meeting of the stockholders was held on January 14, 1899. At such meeting no directors were elected, but the proceedings of the meeting of the directors held on the same day, 4½ hours prior thereto, were approved.

Seventh meeting of the board of directors held on Monday, July 15, at 3 o'clock.

All directors present.

Mr. Steinfeld submitted his proposition stating "All of which is fully set forth in his written proposition."

The minutes proceed, and on motion duly seconded, it was unanimously resolved that the president be, and he hereby is, authorized and directed to call a special meeting of the stockholders of this corporation, for the purpose of submitting to their consideration the written proposition of Mr. Albert Steinfeld and for them to decide whether or not the same should be accepted or rejected, said meeting to be held at such time and place as the president shall deem proper, but not later than the first day of October, 1901,
520 and notice of such meeting to be given as required by the by-laws.

Eighth meeting of the board of directors, held on Tuesday, October 1, 1901.

All present.

The meeting was called to order by the president. The minutes of the last meeting were read and approved.

Mr. Albert Steinfeld stated, he would agree in consideration of this company performing and paying for the assessment work done and to be done, for the years 1900 and 1902 upon all of the mining claims mentioned and described in his communication to this company of date July 15th, 1901, to extend the time within which this company has the right to accept his said proposition and to pay the amounts of money required by it to be paid if the proposition is accepted, from October 15th, 1901, the date mentioned in said communication until the 15th day of September, 1902, provided, however, that upon said 15th day of September, 1902, this company not only pay to him the amount of money called for in said communication, to-wit: \$15,192.45, but also to pay him the interest from October 15th, 1901, until the 15th day of September, 1902, at the same rate as *us* is set forth in said communication.

521 On motion duly seconded it was unanimously resolved that the foregoing proposition of Mr. Steinfeld be accepted, and that the president of this company be, and is hereby authorized to do perform and pay for the annual assessment work for the years 1900, 1901, 1902, upon the mining claims mentioned in the communication of Mr. Albert Steinfeld, of date July 15th, 1901, and further

Resolved, that the meeting of stockholders authorized and directed by the resolution of this board heretofore adopted, to be called by the president for the purpose of considering the proposition of Mr. Steinfeld of date July 15th, 1901, be called by him on a day not later than the 15th day of September, 1902.

Eleventh meeting of the board of directors held on May, 13th, 1903. All present.

Mr. Steinfeld stated that April 3, 1903, he had made or given on behalf of himself, of the Mammoth Company, and of this company, a written option to Geo. A. Beaton of New York City and his assigns, for the sale amongst other things, of all the property, rights, interests and assets of this corporation.

Twelfth meeting of the board of directors of the Silver Bell Copper Company was held at the office of the company, in Tucson, Arizona, on May 20, 1903, at 4 o'clock p. m., pursuant to call of the president.

522 Present: J. N. Curtis, president, Albert Steinfeld, director; R. K. Shelton, director.

The president reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all mining claims of this company in the Silver Bell mining district, Pima County, Arizona; and all the plant and personal property used therewith also all the machinery, plant and personal property used therewith; also of the mining claims and personal property used therewith of the Mammoth Copper Company, as well as certain other mining claims or interests therein which stand in the name of Albert Steinfeld and in the individual name of the president, and to pay therefor the sum of \$515,000, as follows: the sum of \$515,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, treasurer, and the balance, \$400,000 in four equal installments of \$100,000 each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent. per annum; and for which deferred payments said company executed to this company its four promissory notes, which now are also in the hands of the treasurer.

He further reported that the necessary deeds and agreements had been executed by the president and secretary of this
523 company and amongst others a guarantee agreement which guarantee agreement was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld individually. The said agreements were read and considered.

He further reported that the deeds so executed had been placed

in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company, had again submitted for acceptance, the proposition which he had heretofore submitted in writing on July 15th, 1901, with the modifications, however, that this company shall pay to him forthwith in cash, the sums of money, which in said proposition were required to be paid on October 15th, 1901, to-wit: The sum of \$15,192.45 and also shall forthwith pay in cash, interest thereon from October 15th, 1901, to this date, at the rate of 1 per cent per month, amounting to \$2,924.55, making a total of \$18,117.00, and that this company shall also assume and pay all obligations, which he, said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company and keep him free and harmless

524 from any and all expense and loss which may arise by reason of any claim or asserted claim, of any person whatsoever, for or on account *or* arising out of or connected with the present sale and negotiations or any past negotiation or transaction in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy the commissions which he, said Steinfeld, agreed to pay to said Murphy, to-wit, the sum of \$25,000, said agreement being made for and on behalf of this company and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one J. M. Burnett for commission.

Also that this company shall indemnify him against loss, damage and expense, by reason of his having guaranteed the titles to the mining claims sold or agreed to be sold to said Imperial Copper Company, as is set forth in the guarantee agreement heretofore submitted to this meeting.

525 The president also stated that it was necessary to adjust with the Mammoth Copper Company, the disposition that was to be made of the purchase money upon the sale.

He then submitted the agreement between this company, the said Mammoth Copper Company, and Albert Steinfeld, on this point, and also covering the matter of guarantee.

After a full consideration the following resolutions were unanimously adopted, to-wit:

(1) Resolved, that all of the acts of the president and secretary of this corporation, and all papers, agreements and deeds signed by them for or on behalf of this corporation in the matter of the negotiation and sale by this company's property to the Imperial Copper Company, be, and the same hereby are, ratified, approved and confirmed.

(2) Resolved, that the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he, said Steinfeld, be forthwith paid by this corporation the sum of eighteen

thousand one hundred and seventeen dollars (\$18,117.00)
 526 and out of the first moneys received by this company upon
 the promissory notes of the Imperial Copper Company, he,
 said Steinfeld, as treasurer of this company, shall retain sufficient
 moneys to pay the amount necessary to be paid to Margaret Francis
 and Julius H. Volkert under the agreement with them aforesaid;
 and to pay to the assigns or legal representatives of Carl S. Nielsen
 (he being now deceased) and to Mary Nielsen, the amount necessary
 to be paid under the agreement with said Nielsens aforesaid; and,
 when said amounts respectively become due, to pay the same to
 the parties entitled thereto.

(3) Resolved, that Albert Steinfeld, as treasurer of this company,
 be and he is hereby authorized to pay N. O. Murphy whatever
 commissions may be coming to him.

(4) Resolved, that the agreement this day made by the president
 and secretary of the corporation with the Mammoth Copper Com-
 pany and Albert Steinfeld, in regard to the disposition of the pro-
 ceeds of the sale this day made to the Imperial Copper Company,
 and indemnifying said Steinfeld, be, and the same is hereby ratified,
 approved and confirmed.

(5) Resolved, that the president and secretary of this corpora-
 tion be, and they are hereby authorized, empowered and directed,
 in such manner and form as they deem necessary or proper, to
 indemnify said Steinfeld, against all loss, damage and expense
 that may arise to him by reason of his having guaranteed the titles
 to the properties so sold, or agreed to be sold to the said Imperial
 Copper Company and that he, and they hereby are, authorized,
 empowered and directed to do or cause to be done all things, and to
 execute all papers, documents or other writings, which they deem
 necessary in the premises.

The minutes of this meeting were then read and after first being
 amended by striking out lines 1 to 16, both inclusive on page 46
 of this book (page 524 of this abstract), and striking out part of
 line 21 and all of lines 22 and 23 (page 525 of this abstract)
 527 on the same page, the same were, on motion, approved as
 amended.

On motion the meeting adjourned subject to the call of the presi-
 dent.

(Signed)

J. N. CURTIS, *President*.

R. K. SHELTON, *Secretary*.

ALBERT STEINFELD, *Director*.

Special meeting of the stockholders held on the 29th day of
 May, 1903.

All stock present.

The president stated that the object of the meeting was to present
 to the stockholders for their consideration, and for such action as
 they deemed proper, the matters and things, done by him as presi-
 dent and by R. K. Shelton, as secretary of the corporation in carry-
 ing out the agreement of sale and selling the property of the cor-
 poration to the Imperial Copper Company. Also the matters and

things done and ordered to be done by the board of directors of the corporation as set forth in the minutes of the meeting of the board held on May 20, 1903. Also a certain contract of date May 20, 1903, entered into by the president and secretary for and on behalf of this corporation, with Mammoth Copper Company, 528 a corporation, and Albert Steinfeld.

He then presented either the originals or copies of all agreements, deeds and papers so signed and executed by himself, and the secretary; also the agreement of May 20th, 1903, last mentioned; also the minutes and records of the meeting of the board of directors of date May 20, 1903, all of which were read and duly considered.

The following resolution was then offered by Mr. R. K. Shelton:

Resolved, that the actions and resolutions of the board of directors of this corporation as set forth in the minutes of this meeting held May 20, 1903, and that the agreement of date May 20, 1903, made and executed by the president and secretary of this company for and in behalf and in the name of this company, with the Mammoth Copper Company and Albert Steinfeld, as well as all other agreements, papers, deeds and instruments made and executed by the president and secretary in making the sale of this company's property to the Imperial Copper Company be, and the same hereby are ratified, approved and confirmed.

On motion duly seconded, the above resolution was unanimously adopted, all of the stockholders representing all of the shares 529 of the capital stock of the corporation voting in favor thereof.

Meeting of the stockholders of the Silver Bell Copper Company, held at the office of Smith & Ives, Tucson, Arizona, December 26th, 1903, 4 p. m.

The following is the stenographic report of the proceedings:

By Mr. Ives: If you will pardon me for making an opening statement—we are here to see what we can do. You made us a proposition, which was the same as the proposition which was submitted by Mr. Lillienthal in San Francisco.

Now, we are unwilling, at this stage of the game to do anything. When I say "we," I mean Mr. Steinfeld, but we want to do things if we can agree. As I gathered, one of the chief contentions of Mr. Zeckendorf's was that Mr. Steinfeld had the personal custody of the proceeds of these, and of the notes, and he objected to it.

Now, since then, he has brought two suits, one an attachment or open suit for money in which an attachment has been issued, and the other, a stockholders' suit in which he has obtained an injunction.

Now, we want those suits disposed of. I am talking frankly 530 in that matter—and until disposed of, Mr. Steinfeld is unwilling to agree in anything. He feels his business integrity has been impugned, and he wants them disposed of. Now, we want to meet you as far as we can. We will never be willing to admit that Mr. Steinfeld had the possession of these moneys wrongfully. We maintain now, as we maintained then, that he had them by virtue of the agreement which was executed in pursuance of a reso-

lution of the board of directors which he claims, and we believe was, a valid resolution and a valid agreement. (I am not arguing that point with you). He claims that. Now, you have attacked that agreement and the resolution. The prayer of your complaint asks that a receiver be appointed to hold the moneys and the notes in the bank of California for the benefit of the Silver Bell Copper Company; that an injunction issue restraining Steinfeld from receiving, and the Bank of California from delivering to him said money and notes; that Steinfeld be required to set forth—

(3) That Steinfeld be required to set forth the nature of his claim to said money and notes and the terms of the agreement; and to account to the Silver Bell Copper Company for moneys received.

(4) That the resolution and agreement therein referred to be declared null and void.

531 (5) That the plaintiff have such other and further relief as may be just in the premises.

The first paragraph, that a receiver be appointed, I will pass.

The second subdivision in your prayer that an injunction issue—that has been issued.

And third, that Mr. Steinfeld be required to set forth the nature of his claim; he has done, and he has given you a copy of the resolution which you already had; and he has given you a copy of the agreement which you did not have before, although we stated as best we could verbally to Mr. Zeckendorf and Mr. Lillienthal in San Francisco. The fifth, asking for any other or further relief, necessarily I pass.

The fourth paragraph, that the resolution and agreement herein referred to be declared null and void, we are willing to accede to.

I omitted to state that the third subdivision of your prayer asks, not only that we disclose the nature of his claim, but that he account for the moneys. That account he has rendered and will be prepared to submit at this meeting. He has resigned his office of treasurer of the company, and he has turned over to Mr. Curtis all of the money

532 which by such account appears to have been collected by him and not expended, except \$51,500.00 which has been *granted*—
sheed in his hands in the Franklin suit, and he has given to the company a bond with two good sureties in that sum of money that he will turn over that money to the Silver Bell Copper Company whenever the suit is dismissed, or will turn over the balance, if any judgment should be collected, after paying what amount of money has been adjudged by judgment or otherwise to be due Mr. Franklin.

So we have set forth the nature of our claim. We have made the account; we have turned over the money. We are unwilling to admit that we did not have the right to this money. We will assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and agreement, and relin-

quish all right whatever to the personal custody of that money and turn it over to the company.

Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the board) should offer. But first, I suggest an organization.

Mr. Shelton reads proposed resolution: "Resolved, that the agreement executed on May 28th, (29) by the president and secretary of the corporation, the Mammoth Copper Company and Albert Steinfeld, be, and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void.

Judge BARNES: We cannot settle the prayer of the complaint here.

Mr. IVES: We are acquiescing in your demand; that is what I mean.

Judge BARNES: Have you got a copy of that contract to attach to that resolution?

Mr. IVES: Yes, I am perfectly willing to do that.

Judge BARNES: And let that go on the minutes.

Mr. IVES: Certainly.

Mr. IVES: I intended this to be a stockholders' meeting. We will now organize as a stockholders' meeting.

534 Our desire is in good faith to rescind that resolution, but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.

Stockholders' Meeting.

Present: J. N. Curtis, president; R. K. Shelton, secretary.

Stock represented: Mr. L. Zeckendorf, 250 shares; Mr. Steinfeld, 249 shares; Mr. Albert Steinfeld, trustee, 330 shares; Mr. R. K. Shelton, one share; Mr. J. N. Curtis, 170 shares; total 1,000 shares.

Judge BARNES: There is a question about that.

Mr. IVES: That is the way it appears on the books of the company, that does not consider any question whatever as to the ownership of the stock; that is the way it appears on the books of the company for voting purposes, only.

Judge BARNES: As I read the minutes—I have a copy of the minutes—that heretofore in the meetings of the stockholders, 529 shares of stock of this company have stood in the name of
535 L. Zeckendorf and Company, and they have been voted as such at all stockholders' meetings until this. That is an asset of L. Zeckendorf and Co.; never been divided; an asset of that company, would be liable to its debts; the creditors could pursue it; it belongs to L. Zeckendorf and Company, it does not belong to Mr. Zeckendorf or Mr. Steinfeld, except as they agree to separate it.

Mr. IVES: Has it ever been separated on the books of the company?

Mr. STEINFELD: Yes, sir.

Mr. IVES: As far as the stockholders' meeting is concerned, the

books of the company control. There is no waiver with respect to any ownership of stock.

Judge BARNES: We have no objection to passing that resolution, on behalf of Mr. Zeckendorf.

I don't care to discuss the questions you have gone over. I don't know as anything is to be gained by it. If the contract of May 20th is rescinded that is all we care for on that point.

536 Mr. CURTIS: We have not voted on this resolution.

Mr. IVES: Call the roll.

Mr. Curtis called the roll and the following named stockholders voted "yes" in favor of said resolution, the number of shares opposite their respective names:

Mr. L. Zeckendorf, 250 shares, Yes. Mr. Albert Steinfeld, 249 shares, Yes. Mr. Steinfeld, trustee, 330 shares. Mr. R. K. Shelton, one share, yes. Mr. J. N. Curtis, 170 shares, yes.

Mr. IVES: I will change this resolution: "Agreement executed on May 20th, by the president and secretary of the corporation, with the Mammoth Copper Company with Albert Steinfeld, a copy of which is hereto annexed.

Judge BARNES: Yes, I will see if it is the contract. I think it is.

Mr. IVES: It is a copy of the contract I served you with.

537 Mr. IVES: I will add, that Mr. Steinfeld, in addition to giving Mr. Curtis the money, has given Mr. Curtis an order upon the Bank of California; I mean Mr. Curtis as officer of the corporation, of the Silver Bell Copper Company—an order upon the Bank of California for the money they have, and the notes; so that Mr. Steinfeld no longer makes any claim whatever for the personal custody of either the money or the notes.

Judge BARNES: As a stockholder of this company, Mr. Zeckendorf protests against the funds of this company being deposited in any other than in the name of the company, by its treasurer, and he insists as a stockholder, that the treasurer be required to give a bond for the faithful performance of his duties. And he protests against the funds of the company being kept in the name of anybody either as treasurer personally, or in any other manner except in the name of the company, and to be drawn out by the treasurer on direction of the company. If Mr. Steinfeld resigns we will choose another treasurer.

Mr. IVES: The directors will have to choose the treasurer.

538 Judge BARNES: Mr. Zeckendorf does not object to Mr. Steinfeld being the treasurer of this corporation.

Mr. IVES: I will make a motion in the name of Mr. Steinfeld.

Mr. Steinfeld moves that the funds of the company shall be deposited in the name of the company by its treasurer, and shall not be kept in the name of anyone as trustee or personally, or in any manner except in the name of the company, by its treasurer, and shall be drawn out only by the treasurer at the direction of the company.

We have left out what you said about the bond, for the present, anyhow.

Mr. Steinfeld makes the motion. Is that seconded by Mr. Zeckendorf?

Mr. ZECKENDORF: Yes.

The aforesaid resolution put to a vote and all the stock voted in favor of the resolution and the same was declared passed.

Judge BARNES: Now with reference as to who shall be treasurer. That is a question for the board of directors; and I would suggest on behalf of Mr. Zeckendorf, when they do choose a treasurer, that Mr. Zeckendorf has no objection to Mr. Steinfeld being treasurer; but that whoever shall be treasurer they shall give a reasonable bond in proportion to the amount of money in his hands.

Mr. IVES: That is a very large amount of money.

Mr. ZECKENDORF: I think it should be for the amount involved.

Judge BARNES: Yes, for the amount in his hands.

Mr. IVES: That is a most unusual proceeding. We will consider it later.

Judge BARNES: Have you any further business you desire to bring before the meeting?

Mr. IVES: I don't know of any.

540 Judge BARNES: Now, we want to say here at this meeting.

Mr. Shelton appears as a director of the company. He is an employé of L. Zeckendorf and Company, is not the owner of any stock, and therefore he has no right to hold the office of director; he evades it by having one share of stock transferred to him; he don't own it; it is a mere evasion of that statute which says that a director must be a stockholder. It means a bona fide stockholder. We have no objection to Mr. Shelton personally; he is an employé down there; he is down there to serve L. Zeckendorf and Company and we don't want to embarrass him by having him get into the difficulties of this corporation; and we think that this directors' meeting ought to take some action in that particular; if they desire to do it. Mr. Zeckendorf is a minority stockholder, but he is a large stockholder besides the assets belong to L. Zeckendorf and Company. He is one of the three men that own this property. This property is all owned by Mr. Steinfeld, Mr. Curtis and Mr. Zeckendorf. Mr. Zeckendorf is the only one not allowed to be a director, and we think they ought to be directors who are bona fide stockholders.

Mr. IVES: We will consider that. For myself, personally, I see nothing unreasonable in that, but until these suits are disposed of we feel we have gone as far as we care to.

541 Judge BARNES: There is another matter we desire to bring before you. This company has practically sold its assets, and got nothing left but the proceeds of that sale; it has got cash and notes coming in. There are some obligations. There is an obligation on Mr. Steinfeld's part to guarantee these titles up to the 20th of May when the last payments are due. Now, these guaranties are matters that Mr. Zeckendorf regards as of small moment; he would be willing to assume the obligations of all of them for fifteen or twenty thousand dollars. We do not think that with \$200,000 of money coming in between now and next April many times more

than enough to meet any obligations that can come up, including the suit of Mr. Franklin, or any other threatened suits, or to make good the guarantee of good title up to the 20th of May. That it is an injustice to the stockholders of this company to hold the funds back as against Mr. Franklin's suit; that suit cannot possibly be tried until long after the 20th of April. We think it is an injustice to these stockholders to tie up these funds, when there is over \$200,000 coming in, more than ample to pay them. More than that, Mr. Zeckendorf is amply good to protect Mr. Steinfeld to the extent of his interest in this company. We feel that the moneys on hand

ought to be divided up; first, to the paying of Mrs. Francis, 542 whatever it is, 12,000; to the paying of Mrs. Nielsen; and that the balance of the money ought to be paid to the stockholders; they ought to have the use of the money; and leave to the last payment to the protection of these obligations. They are not dangerous, to the extent of more than \$50,000 at the outside, and there will be \$100,000 and 6 per cent. interest due on the 20th day of May. Mr. Franklin's suit cannot be tried until long after that.

So that, we think that the moneys on hand, the proceeds of the sale of this property, after deducting sufficient to pay Mrs. Nielsen and Mrs. Francis, that balance of the money should be distributed, and that there ought to be a dividend made of these funds. And I make a still further suggestion. It has been stated here that they are very anxious to have this injunction dismissed; if this be done and the money reserved or paid to Mrs. Nielsen and Mrs. Francis and a dividend be made of the money on hand, leaving to the last payment the protection of Mr. Steinfeld's obligations and by leaving these notes in the hands of the Bank of California with directions to collect this money and deposit it to the credit of the company. With that done, I am satisfied that Mr. Zeckendorf would be very willing to dismiss the injunction suit.

Mr. IVES: While in all human probability these notes will 543 be paid they have not been paid yet. If the Imperial Copper Company should turn out to be unable or unwilling to pay them, the mine will come back.

Judge BARNES: And they are good for all these obligations.

Mr. IVES: The mines would come back. Now, whether it would be good policy for this company to distribute all of its funds without any money to work the mines, I concur that that is a question of judgment.

Judge BARNES: These three gentlemen are well able to do that and they can raise money.

Mr. IVES: It won't be long after the notes are paid. I won't say that there won't be any distribution, but I think that these suits should be dismissed without any conditions whatever. We have complied with the prayer of your complaint.

Judge BARNES: I won't say whether they will or not. I am simply discussing it as a business policy; that these funds ought to be distributed. The company is not engaged in any business;

544 its mines are sold, if they should come back they would come back free from any obligations. There is no reason why my client, Mr. Zeckendorf, should not have the use of his money; no

reason in the world; I think Mr. Curtis has about \$17,000 of this money; I don't see why he (Louis Zeckendorf) should not have his.

Mr. IVES: That — a question; it is a matter of policy and there is a great deal to say in support of the view you take of it. That will be considered. Until the suits are disposed of.

Judge BARNES: Those things will have to be somewhat simultaneously, you cannot expect those things to be done unless they are done as current acts.

Mr. IVES: This is practically a demand by Mr. Zeckendorf who chances to be plaintiff in a suit which it appears to me to be totally without merit——

Judge BARNES: I have not said that; I said we would consider this matter; I have not said what we would do; I simply suggested that it would be wise to consult together——

545 Mr. IVES: We feel that we should be met now and the injunction suit dismissed and the attachment suit.

Judge BARNES: We will consider that.

Mr. IVES: I will now show you this statement.

(Statement omitted in this copy.)

Mr. IVES: We are not asking you to audit it; we only want you to see what has been done.

Judge BARNES: Now this item of \$51,500 garnishee of Mr. Franklin; I don't think that money should be held back from these stockholders that is a contested lawsuit, and it will probably not be settled for two or three years.

Mr. IVES: Mr. Curtis, has Mr. Steinfeld turned over to you as officer of this company the sum of sixty thousand dollars in money?

546 Mr. CURTIS: Yes, sir.

Q. You have that money?

A. Yes, sir.

Q. And will now deposit it to the credit of the Silver Bell Copper Company in pursuance of this resolution?

A. Yes, sir.

Q. You have an order upon the Bank of California for the \$49,987.50?

A. Yes, sir.

Q. You have it as officer of this company?

A. Yes, sir.

Q. Signed by Steinfeld, instructing the bank to deliver it to you?

A. Yes, sir; as officer of this company.

Q. And when you get it as officer of this company, you propose to deposit it to the credit of the company in pursuance to the resolution passed here today?

A. Yes, sir.

547 By Judge BARNES: Where deposit it?

Mr. IVES: Where do you suggest?

Judge BARNES: The banks here in Tucson are good banks; I don't see why you should go to California.

Mr. IVES: Is that satisfactory to you? Judge Barnes suggests that the money be deposited in the banks here at Tucson.

Mr. ZECKENDORF: I have no objection.

Mr. IVES: Is that satisfactory to you Mr. Shelton?

Mr. SHELTON: Yes, sir.

Mr. IVES: Then Mr. Curtis, you will deposit it here in Tucson.

548 Mr. IVES: Mr. Curtis, a bond has been given by Mr. Steinfeld for this \$51,500 garnishee of Mr. Franklin's. You have that bond as officer of the company?

A. Yes, sir.

Mr. IVES: Now, Judge, we have gone quite a little distance.

Judge BARNES: Yes, and we will think it over. I think I have stated to you about what Mr. Zeckendorf's feeling is. I don't think we should allow sentiment to trouble us. Mr. Zeckendorf is not pugnacious by any means, but he feels that he is entitled to his dividends and he ought to have his money and he feels that he can make good and that Mr. Steinfeld and Mr. Curtis can make good whenever the time comes.

Mr. IVES: Is there anything else?

Judge BARNES: We have nothing to offer.

Judge BARNES: Wait a minute; I understood that these three hundred shares acquired from Mrs. Nielson on which
549 there is payable some \$10,000 is the property of the company—

Mr. IVES: That is a matter we won't discuss; we won't discuss anything whatever until those suits are dismissed.

Judge BARNES: Mr. Zeckendorf claims, and will claim, if the difficulty goes on that those 300 shares belong to L. Zeckendorf and Company, but he is willing to state that they belong to the corporation; he is willing that Mr. Curtis shall have the benefit of that proportion, but we want to know which it is.

Mr. IVES: That is a matter the stockholders have nothing to do with.

Meeting adjourned.

R. K. SHELTON, *Secretary*.

The following is the identical resolution which was offered at the stockholders' meeting and was unanimously adopted:

550 "Resolved, That the agreement executed on May 20th, by the president and secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, a copy of which is hereto annexed, be, and the same is, hereby rescinded; and that the said agreement and the resolution of the directors passed on said day, be declared null and void.

(Here follows agreement.)

Special Meeting of the Board of Directors of the Silver Bell Copper Company Held at the Office of the Company, in the City of Tucson, on the 26th Day of December, 1903.

Present:

J. N. Curtis, President.
R. K. Shelton, Secretary.
Albert Steinfeld.

Mr. Albert Steinfeld tendered his resignation as treasurer.

On motion of Mr. Shelton, seconded, the resignation was accepted.

On motion of Mr. Shelton, seconded by Mr. Steinfeld,
551 Mr. Curtis was unanimously elected treasurer of the corporation.

Mr. Shelton offered the following resolution:

"Whereas, at the twelfth meeting of the board of directors of this company held at the office of the company in the City of Tucson on the 20th day of May, 1903, the proceedings whereof appear upon pages 43, 44, 45, 46, 47 and 48 of the minute book of this corporation, certain resolutions were passed, which said resolutions are set out in full upon said minutes; and,

"Whereas, simultaneously with the passage of the resolutions a certain agreement of date May 20, 1903, was executed and delivered, which said agreement was in the words and figures following, to-wit:

"This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld of Tucson, party of the third part, witnesseth:

552 Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation as per written agreements heretofore made, and deeds for which property are now in escrow with the Phenix National Bank of Phenix, Arizona; and

Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with said Imperial Copper Company as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain guarantee agreement, wherein amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and parties of the first and second part desire to indemnify him against loss by reason of any said matters or things so done by him.

Now, therefore, in consideration of the premises and of the sum of One Dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed, that the purchase price paid and to be paid upon

the said sale, shall belong to and be the property of the said Silver Bell Copper Company.

553 And it is further agreed that the four promissory notes, of One Hundred Thousand Dollars (\$100,000) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee and as security for, and as indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed, that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate." ; And,

Whereas, in pursuance of said agreement four
554 certain promissory notes made by the Imperial Copper Company to the order of the Silver Bell Copper Company were endorsed and turned over to Albert Steinfeld; and

Whereas, said Steinfeld duly received the proceeds of the first of said notes and paid out for the benefit of this company a certain proportion thereof; and

Whereas, the said Steinfeld deposited the three remaining notes with the Bank of California at San Francisco for collection; and

Whereas, the said Bank of California presented for collection the first maturing of the said notes, and received the proceeds thereof and turned over to said Steinfeld all of the said proceeds except the sum of \$49,987.50; and

Whereas, the said bank still has the last mentioned sum and the two remaining notes; and

Whereas, Louis Zeckendorf, who appears upon the books of the company to own 250 shares of the capital stock of this company, in violation of the rights of the said Steinfeld under the said agreement and resolutions, notified the Bank of California not to pay the said sum of money or to deliver the said notes or the proceeds thereof to the said Steinfeld; and

555 Whereas, the said Zeckendorf did thereafter bring suit in the Superior Court of the County of San Francisco and State of California against this company, the Bank of California, Albert Steinfeld, J. N. Curtis and R. K. Shelton, the directors of this company, wherein he filed his verified complaint, in which said complaint he alleged, referring to the said resolutions, as follows:

That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at

all, in that said Steinfeld joined in the vote therefor, and in that the other two directors are in the employ of the said Steinfeld and wholly under his control; and in that said Shelton does not own any shares of stock of said corporation, and in that they were pretended to be adopted at the instigation of said Steinfeld and as a part of a claim on his part to defraud said company and its shareholders * * * and said two other directors and defendants Curtis and Shelton then and always were and still are acting solely in the interest of and are under the complete control and dominion of said Steinfeld and blindly, and without consideration of the interests of said corporation, carry out all of his directions * * *

That it would be a futile and vain proceeding for this plaintiff (Zeckendorf) to demand of said board of directors to take
556 proceedings on behalf of said Silver Bell Copper Company against said Steinfeld to recover the moneys and notes so unlawfully held by him, and which he claims to have the right to hold as against said corporation, or to rescind said last mentioned agreement or resolutions, because said directors and defendants Curtis and Shelton are acting solely in the interest of and are under the sole control of said Steinfeld and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised;

And in which said complaint the said Zeckendorf demanded judgment as follows:

(1) That a receiver be appointed to hold said moneys and said notes in said Bank of California, for the benefit of said Silver Bell Copper Company, during the pendency of this suit;

(2) That an injunction issue restraining said Steinfeld from receiving, and said Bank of California from delivering to him said moneys or said notes now in the custody of said Bank of California.

(3) That said Steinfeld be required to set forth the nature of his claim to said moneys and said notes, and the terms of the agreements referred to in said resolutions and to account to said
557 Silver Bell Copper Company for moneys received or that may hereafter be received by him, belonging to said corporation.

(4) That said resolutions and the agreements therein referred to be declared null and void." And

Whereas, the said resolutions were passed by the board of directors of this company and the said agreement was executed by its officers in good faith and with the sole intent and purpose to advance and protect the interest of this company and of all persons concerned, nevertheless, in view of the said actions of the said Zeckendorf, the owner of a large portion of the stock of this corporation, and of the charges and allegations which he has made, and of the hostile attitude which he has assumed toward the entire transaction, and in compliance with his wish, prayer and demand, and in order to avoid litigation; and all of the owners of the stock of the said corporation except the said Zeckendorf, having been consulted by the directors, and having acquiesced in the forego-

ing recitations and in this action about to be taken by this board, and the said Albert Steinfeld and the Mammoth Copper Company having indicated their willingness and consent thereto, and having offered to sign any paper or papers, and to do upon demand all things and acts necessary to accomplish and consummate a full
558 recission of the said agreement; and the said Steinfeld
California for the said money and notes, and having tendered to this company all of the said funds still in his hands, together with a full and complete account of all moneys received and disbursed by him.

Be It Resolved:

1. That the said resolutions passed by the directors on the said 20th day of May, 1903, be, and the same are, rescinded and repealed.

2. That the said agreement heretofore recited in full be rescinded and declared null and void.

3. That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the bank of California all of the said funds and the two said notes of the Imperial Copper Company which have not yet matured, and to give his proper receipt therefor.

4. That the officers of this company be instructed to execute with and deliver to said Steinfeld and Mammoth Copper Company, an agreement rescinding the said agreement ab initio and to do and cause to be done all such acts and things as may be necessary to accomplish and consummate the full recission of the said agreement; and that J. N. Curtis, the president and treasurer of the
559 company be instructed to receive from said Steinfeld the
funds tendered by him as hereinbefore recited, and be further instructed to demand and receive from the Bank of California the said money and notes now held by the said bank.

The foregoing resolution was adopted, Mr. Curtis and Mr. Shelton voting in the affirmative, and Mr. Steinfeld being present and not voting.

Mr. Steinfeld thereupon made the following statement:

"I concur in the above resolution and consent to the recission of the said contract. I have not voted thereon by reason of the fact that it might be stated that I was an interested party."

Mr. Shelton offered the following resolution:

"Resolved that on account of Mr. Albert Steinfeld of funds of the Silver Bell Copper Company, held by him under a certain agreement executed on May 20, 1903, which has been this day rescinded, which said account is as follows:

Silver Bell Copper Company in Account With Albert Steinfeld.

1903.		
May 20.	By Imperial Cop. Co. 1st payment.....	\$115,000.00
May 21.	To Teleg. trans. L.	
560	Zeckendorf & Co., \$75,000.00	
	Less ret.....	617.00
		<hr/> 74,387.00
To commission paid N. O.		
Murphy	22,500.00	
To A. Steinfeld cont.....	18,117.00	
	<hr/>	<hr/>
	\$115,000.00	115,000.00
Aug. 23. By Imperial Cop.		
Co., 1st note		\$101,500.00
Aug. 23. To L. Zeckendorf		
& Co. dep.	35,000.00	
Sept. 4. To L. Zeckendorf		
& Co. Dep.....	5,000.00	
Oct. 20. To F. J. Heney, con-		
tract	1,500.00	
To garnishee S. M. Frank-		
lin suit	51,500.00	
To balance on hand....	8,500.00	
	<hr/>	<hr/>
	\$101,500.00	\$101,500.00
Nov. 23. By Imperial Cop.		
Co., 2nd note.....		\$102,987.50
Nov. 25. To Smith & Ives		
ret	1,500.00	
To Attachment Bank Calif..	49,987.50	
Balance on hand	51,500.00	
	<hr/>	<hr/>
	\$102,987.50	\$102,987.50
561 Balance on hand 1st note.....		\$8,500.00
Balance on hand 2nd note.....		51,500.00
Attached Bank of California.....		49,987.50
		<hr/>
		\$109,987.50

Be, and is hereby audited and approved.

At a special meeting of the board of directors held at the office of the company No. 30 S. Stone Avenue, in the city of Tucson, on the 16th day of January, 1904.

Present: Directors, J. N. Curtis, president; R. K. Shelton, secretary; Albert Steinfeld.

Mr. Shelton offered the following resolution:

Resolved, that J. N. Curtis be elected president and treasurer of this corporation for the year ensuing and until his successor be elected.

The resolution was unanimously adopted.

Mr. Steinfeld offered the following resolution:

Resolved, that R. K. Shelton be elected secretary of this corporation for the year ensuing and until his successor be elected.

The resolution was unanimously adopted.

Mr. Shelton offered the following resolution:

562 Whereas, the properties of this company together with certain mining properties belonging to and owned by the Mammoth Copper Company and Albert Steinfeld, respectively, were on or about the 20th day of May, 1903, sold to the Imperial Copper Company for the gross sum of \$515,000, payable \$115,000 in cash and the balance in four promissory notes, each for the sum of \$100,000 with interest at the rate of 6 per cent per annum, payable respectively three, six, nine and twelve months after date; and

Whereas, deeds properly executed by this company for the properties owned by it, and properly executed by the Mammoth Copper Company for properties owned by it and properly executed by Albert Steinfeld for properties owned by him, have been deposited in escrow with the Phenix National Bank, to be delivered to the guarantee, in all of such deeds, to-wit, the said Imperial Copper Company, upon the payment of the said notes and all of them, according to the tenor thereof; and

Whereas, simultaneously with the said sale an agreement was made between this company and the said Mammoth Copper Company, and the said Albert Steinfeld, which provided for the disposition of all of the said purchase price; and

563 Whereas, the said agreement was by consent of all parties thereto and of all parties interested therein, rescinded on or about the 26th day of December, 1903; and

Whereas, the said Albert Steinfeld did on or about the said 26th day of December, 1903, return to this company, by paying the same to the treasurer thereof, the sum of \$319,487.50 upon said purchase price and consideration for the said agreement rescinded as aforesaid; and

Whereas, previous to the said rescission of said agreement the treasurer of this company had received the sum of \$319,487.50 upon the said purchase, and has at this time in his hands two of the said notes, to-wit, the notes becoming due on the 20th day of February, 1904, and the 20th day of May, 1904; and

Whereas, Albert Steinfeld and the Mammoth Copper Company jointly do claim that the properties owned by them and sold to the Imperial Copper Company as aforesaid, were and are of far greater value than the property owned by this company and sold to the Imperial Copper Company as aforesaid; and

Whereas, the said Steinfeld and the Mammoth Copper Company acting jointly as aforesaid have asserted their ownership of and right of possession to more than one-half of the said purchase price,
564 and have offered to accept one half of the cash received, and one of the said promissory notes in full of all of their claim to any part or portion of the said purchase price; and it appearing by the books of this company that of the said sum of \$319,387.50 the sum of \$25,000 has been paid to N. O. Murphy and A. S.

Donau for commissions effecting the said sale, and that the sum of \$3,000 has been paid to attorneys-at-law for services rendered to this company, and the said \$28,000 being properly a charge upon the whole of said purchase price; and

Whereas, Selim M. Franklin has brought suit against this company for the sum of \$51,500, and an attachment has been issued in said suit, and the said sum of \$51,500 has been garnisheed in the hands of Albert Steinfeld, who at the time of said garnishment was holding that portion of the said purchase price in pursuance of the agreement rescinded as aforesaid and up to this date has been held by him; and

Whereas, the said Albert Steinfeld has given this Company his bond therefor and has now returned to the treasurer of this company \$25,750 thereof, the receipt whereof is hereby acknowledged.

Now, therefore, be it resolved that upon the receipt from said Mammoth Copper Company and Albert Steinfeld of a release
565 jointly and severally of all right and interest in the said purchase price whatsoever, except such as Albert Steinfeld may have as a stockholder of this company, the treasurer of this company be, and is hereby authorized and directed to pay to the said Albert Steinfeld the sum of \$14,543.75 in cash, the same being one-half of the said sum of \$319,487.50, the total cash received, less the said sum of \$28,000; and that the treasurer of this company be and he is hereby authorized and directed to endorse and deliver to the said Albert Steinfeld one of the said promissory notes.

The resolution was adopted, Mr. Curtis and Mr. Shelton voting in favor thereof and Mr. Steinfeld not voting.

The following resolution was unanimously adopted, all of the directors voting for the same.

Whereas, the president and treasurer has in his possession a certain note made by the Imperial Copper Company, to the order of the Silver Bell Copper Company, bearing date on or about May 20th, 1903, and being for the sum of one hundred thousand dollars with interest at the rate of 6 per cent. per annum, and being payable at the Phoenix National Bank, Phoenix, Ariz.; and whereas, all parties interested desire an immediate distribution of the funds of the
company.

566 Now, Therefore, Be It Resolved, that the president and treasurer be, and he is, hereby authorized to sell or discount the said note upon such terms as he may deem reasonable, and to receive the proceeds thereof.

On motion the meeting then adjourned.

R. K. SHELTON, *Secretary*.

Special Meeting of the Board of Directors of the Silver Bell Copper Company, Held at the Office of the Company, in the City of Tucson, No. 30 South Stone Avenue, on the 20th Day of January, 1904.

Present: J. N. Curtis, president; R. K. Shelton, secretary; Albert Steinfeld.

The president and treasurer reported to the board that on the 18th day of January, 1904, in pursuance of a resolution of the board passed on the 16th day of January, 1904, he sold the note of the Imperial Copper Company for the sum of \$103,967 cash, the same being the full face value of said note, together with the accrued interest thereon up to the date of the said sale.

Mr. Shelton moved that the action of the president and treasurer in making the said sale be ratified and confirmed.

The motion was unanimously adopted.

567 J. N. Curtis, president and treasurer, reported that in pursuance of a resolution of the board of directors, he had delivered to Albert Steinfeld one of said promissory notes, of the Imperial Copper Company and a check for the sum of \$145,743.75; also, that he had delivered to Eugene S. Ives a check for \$114.40 for expenses incurred on behalf of the company.

Mr. Shelton moved that the action of Mr. Curtis in issuing the said checks be ratified and approved.

The resolution was unanimously adopted.

Mr. Shelton offered the following resolution:

Resolved that a dividend of \$111 on each share of the capital stock of the company be declared payable to the shareholders of record upon the books of the company and that J. N. Curtis be, and he is hereby instructed to sign and issue checks for the same.

The resolution was unanimously adopted.

EXHIBIT 137.

TUCSON, ARIZ., *July 15th, 1901.*

Silver Bell Copper Company (Formerly Nielsen Mining and Smelting Company), Ariz.

568 GENTLEMEN: On May 16th, 1900, I entered into a contract with Margaret Francis and Julius Volkert in regard to certain mining claims and mill-sites situate in the Silver Bell Mining District, Pima County, Ariz., claimed by them and which are situate either adjoining or near to the Mammoth mine, or better known as the Old Boot mine, which is being operated by your company, a copy of which agreement is hereto annexed.

In pursuance of this contract I have caused to be conveyed to the Mammoth Copper Company, the corporation mentioned in the agreement, all the interest of the said Margaret Francis and Julius Volkert, as well as the interest of the minor heirs of John Francis,

deceased and in consideration *therefore*, I have received the following to-wit:

1. Nine hundred and ninety-seven shares of the full paid up and non-assessable stock of the said Mammoth Copper Company, being all the shares of the capital stock of that corporation, except the three shares held by its directors.

2. The promissory note of said corporation, dated June 8th, 1900, payable to my order one year from date for the sum of \$2,780, with interest thereon from its date until paid at one per cent per month.

3. The promissory note of said corporation, dated June 8th, 569 1900, payable to my order or demand, for \$12,500 with interest from demand at the rate of one per cent per month.

4. A mortgage executed by said corporation on all said mining claims and mill sites, as security for the payment of said two promissory notes.

5. The written agreement of said corporation, dated June 8th, 1900, wherein it agrees to do and perform all the matters and things by me agreed to be done and performed in the said contract of date May 16th, 1900, a copy of which agreement of date June 8th, 1900, is hereto annexed.

The first mentioned promissory note being for the payment of the sum of \$2,780.00 represents the actual amount of money paid by me to Margaret Francis, individually and as guardian of her children, and to Julius Volkert for their deeds to the mining claims and mill sites mentioned in their agreement, to-wit: \$2,500 for the deeds and \$280 or thereabouts for legal and other expenses in connection therewith.

The other promissory note being for \$12,500 is held by me as security for the payment of said Mammoth Copper Company of the sum of \$12,500 provided to be paid to said Francis and Volkert when said mines are sold in accordance with the agreement of 570 May 16, 1900, and as security for the faithful performance on the part of said company of their agreement to me of date June 8th, 1900.

I herewith submit for your inspection the originals of said agreements, notes, mortgages and deeds.

II.

Certain of the mining claims mentioned in the agreement of May 16, 1900, were claimed under different locations by the other claimants, and by the terms of that agreement I was obligated either to acquire such adverse locations and claims by purchase, or to litigate the same.

In order to fulfill the obligations imposed upon me in this regard, it became necessary for me to go to England to see some of the adverse claimants. This I did in the summer of 1900. After considerable negotiations I obtained the deed on the English claimants, Frederick Clark Beckwith, and the Tucson Mining and Smelting Company, Limited, a British corporation and also of Herbert B. Tenney, of Tucson, which deed was dated August 21st, 1900, and conveyed to me the following mining claims situate in said Silver

Bell Mining District, to-wit: Page, Southern Beauty, Silver Bell, Confidence, Union, Emerald, Comet, Prospector, Florence, Imperial and Yankee.

571 The amount of costs and expense by me in the negotiation and in acquiring said deed was as follows:

Purchase price \$5,815.63.

The expenses of trip, attorneys' fees and incidentals, \$2,668.51, all of which sums were expended by me on or about August 21st, 1900.

I now hold in my own name all the mining claims so conveyed to me by such deed.

III.

On June 29th, 1900, I obtained from Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis, their deed conveying to me the Clarence Mining claim, situate in said Silver Bell Mining District, and also, "all their right, title and interest in and to all mining claims, mill sites and property situate in said Silver Bell Mining district, the legal or equitable or record title to which is now in either the Nielsen Mining and Smelting Company, a corporation, or in the Mammoth Copper Company, a corporation, or in the Tucson Mining and Smelting Company, a corporation, or in Frederick Clark Beckwith, or in Julius Volkert or John Francis, or in the heirs, distributees or estate of said John Francis, deceased, or in J. N. Curtis, or in Herbert B. Tenney, or in said Albert Steinfeld." This deed is of record in the office of the county recorder of Pima county, in book 572 22, of deeds to mines, on pages 508, and 509, reference to which is hereby made.

For this deed I paid to the grantors on the 3rd day of July, 1900, the sum of \$2,000 and I now hold in my own name, all the mining claims so conveyed to me.

In this connection, I will further state that on June 29th, 1900, the Nielsen Mining and Smelting Company, by J. N. Curtis, its president, and myself, as parties of the first part, and Mary Nielsen and Carl Nielsen as parties of the second part, entered into an agreement, the original of which is in possession of yourselves. At the time of the execution of this agreement I personally paid to said Nielsens out of my own money, the sum of \$2,000, which was in payment of the quit claim deed executed to me by them and Lewis, above referred to; and it was at the same time agreed by Mr. J. N. Curtis, your president and myself, that the three hundred shares of stock assigned to me by the Nielsens should be held by me in trust until the purchase price thereof, to-wit: Ten thousand dollars was paid by the Nielsen Mining and Smelting Company, as per the agreement, when said shares should be assigned by me to your company.

IV.

I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth 573 Mining Company and by myself are of great value to you, and that your company should own the same, and as an

inducement to you to purchase and acquire the same, I am willing to place you in my shoes, that is to say, to sell and convey to you all the interests so acquired by me, upon my being repaid the amounts of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me, the performance on your part, of all the matters and things and payments which under the various contracts I am liable or responsible for. To this end I herewith submit to you the following proposition:

V.

Proposition.

If you will repay to me, on or before the 15th day of October, 1901, the sums of money I have expended and expenses incurred, as above set forth, with interest thereon from the dates of such respective expenditures up to the 15th day of October, 1901, at the rate of 1 per cent. per month, and aggregating the total sum of fifteen thousand, one hundred and ninety-two dollars and forty-five cents, being the aggregate of the following items, to-wit:

June 8th, 1900, paid Francis and Volkert and expenses \$2,780.00.

574 Interest on above, \$451.75; total \$3,231.75.

August 21, 1900, paid for deed Beckwith, Tucson Mining and Smelting Company, Limited and Tenney, and expenses, trip to Europe to obtain same, and other expenses connected therewith, \$8,484.14.

Interest on same to October 15th, \$1,166.56.

June 29, 1900, paid to the Nielsens and Lewis for their deed, and expenses connected therewith, \$2,000.

Interest on same to October 15th, \$310; total \$15,192.45; and if you will on or before the said 15th day of October, 1901, and at the same time that said repayment is made to me, duly agree in writing to do and perform the annual assessment work required to be done on all mining claims, and pay or repay for the annual assessment work required to be done thereon for the years 1900 and 1901, and further agree to assume and perform all the matters and things agreed to be done by me, or assumed by me in my said agreement with said Margaret Francis and Julius Volkert of date May 16, 1900, and further save and keep me harmless from any loss or expense by reason of my having entered into said agreement:

Then I will agree as follows:

575 First. Immediately to cancel as paid said note for \$2,780, executed to me by said Mammoth Copper Company, and thus extinguish said obligation.

Second. To hold all of said 997 shares of the capital stock of said Mammoth Copper Company, and to hold the \$12,500 promissory note and mortgage executed by said company, and to hold all the mining claims and mill sites conveyed to me by said Frederick Clark Beckwith, Tucson Mining and Smelting Company, Limited and Herbert B. Tenney, by their deed dated August 21, 1900; and the

mining claims and mill sites conveyed to me by said Carl Nielsen, Mary Nielsen, his wife and L. B. Lewis; and to hold the 300 shares of the capital stock of the Nielsen Mining and Smelting Company (now the Silver Bell Copper Company) as trustee for your company, subject to the following trusts and conditions, to-wit:

1. That upon your complying and performing the matters and things by you agreed to be done and performed according to the terms of the written agreement which hereinabove is provided you shall execute to me, that is to say, upon your doing all the matters and things by me agreed to be done and performed under my agreement with said Francis and Volkert of date May 16th, 1900, and upon your paying to them or their assigns the sum of \$12,500 as in said agreement is provided, or procuring their release from said payment; and also paying to said Carl Nielsen and Mary
576 Nielsen, his, her or their assigns or personal representatives, the sum of ten thousand dollars as agreed to be done by our joint agreement with them of date June 29th, 1900; then and in such event I will transfer and assign to you absolutely all of said shares of stock, both said 997 shares of stock of the Mammoth Copper Company and the 300 shares of the Nielsen Mining and Smelting Company; and I will cancel their promissory note for \$12,500 and satisfy on record the said mortgage given as security therefor; and I will convey to you absolutely all the right, title and interest acquired by me under the said deeds executed to me by said Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney and under the deed executed to me by Mary Nielsen, Carl Nielsen, and L. B. Lewis.

2. That in the event you fail to carry out your said agreement with me to do and pay for the annual assessment work upon said mining claims, or to make either said payment of \$12,500 or said payment of \$10,000, respectively, as above provided, or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute to me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay me, as aforesaid, and I
577 am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims and mill sites described in said deeds to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatsoever, equitable or otherwise, thereto or therein.

3. I hereby give you until the 15th day of October, 1901, to accept this proposition and to pay me the said sum of \$15,192.45 to me, and to execute the written agreement above provided for; it being distinctly understood that if you fail to pay me said sum of \$15,192.45 and execute said agreement to me on or before said the 15th day of October, 1901, then this proposition and option to you is ended and in that event I shall hold all said shares of stock in the Mammoth Copper Company, and all said mining claims aforesaid, individually and for my own benefit. The 300 shares of stock in the Nielsen Mining and Smelting Company (now the Silver Bell

Copper Company) however, I will in any event continue to hold under our joint agreement with the Nielsens in regard thereto, unless you wish to disaffirm the said agreement as made by your president in regard thereto.

Yours truly,

ALBERT STEINFELD.

This agreement, in triplicate, made this 16th day of May, 1900, between Albert Steinfeld as the first party, and Margaret Francis and Julius Volkert, as second parties:

Witnesseth, that for and in consideration of the conveyance by said second parties to the Mammoth Copper Company, a corporation, of the following named mining claims, situate in the Silver Bell Mining district, Pima County, Territory of Arizona, to-wit: Murray, Emerald, Prospector, Hamilton, Silver Bell, Florence, Southern Beauty, Union, Comet, Page, Imperial, Yankee, Mollie, Anita, Herbert and Black Daisy, and two mill sites located in said district and named Silver Bell and Hamilton and for the further consideration of the agreement of said second parties to assign, and they do hereby assign, transfer and set over and sell unto said first party all claims, demands and dues they may now have against and from the Tucson Mining and Smelting Company, a corporation unto said first party, said first party hereby agrees:

First. That on the execution hereof he will pay to said second parties \$1,875, and that so soon as the interest of the infant children of said Francis in and to those mining claims conveyed as aforesaid, and in which they are interested, shall be duly conveyed to said Mammoth Copper Company, which said Francis agrees to cause to be done as soon as may be, then first party shall pay to said second party, the further sum of \$625.

Second. The parties hereto have been told that the Tucson Mining and Smelting Company, a British corporation, claims to have an interest in or claim to certain of said mining claims. Therefore the said first party will either by suit or suits or compromise, use his best endeavor to defeat any such claim or claims by resisting the same in the courts, or by compromising and satisfying the same as to him shall seem best; and in and about such litigation or compromise, said second parties will lend said first party all aid in their power.

Third. That said first party will cause the assessment work needful, to be done in a proper manner and in apt time on each and all of said mining claims, and will pay therefor in full; provided however, that said first party shall have the right to recover, or cause to be recovered to said second parties and to thereby vest in them any of said mining claims if the same shall be done on or before the first day of November of each year, and, by said time, he shall also cause such deed or deeds to be recorded in the county recorder's office of said county by said time, then he shall be relieved from doing or causing to be done any assessment work on the claims re-conveyed as aforesaid for the year in which they are reconveyed as aforesaid for the year in which they are reconveyed and thereafter.

Fourth. That certain of said claims have been jumped, and the jumpers have pretended to locate the claims so jumped as their own,

and, in the future other of said claims may be jumped. Therefore, said first party will, either by suit or suits or by compromise, use his best endeavor to dispossess said jumpers, and to cause their said pretended locations to be annul-ed, and to that end, if he cannot compromise with them on such terms as shall seem wise to him, he will cause a suit or suits to be instituted and prosecuted with diligence to final judgment, for the purpose aforesaid, and will bring to the aid of said prosecution all due and proper means to win the same, and said second parties agree that they will lend to said first party in the prosecution thereof, all aid that is in their power to give.

Fifth. That said first party will do whatever he can to sell said mining claims, and that, on the sale thereof, or on the sale of any one or more thereof, then and in that event, he will and shall at once pay to said second parties the further sum of \$12,500; but should he fail to make such sale by the first day of November, 1903, then he shall, if no sale be pending at that time, and if pending, on its being lost, if demand therefor be first made and he be paid the amount of money that he has actually advanced and disbursed
581 in and about getting and maintaining the title in and to said mining claims, and in and to each and all thereof, convey unto the order of said second parties all of said mining claims not theretofore conveyed to them as aforesaid.

In witness whereof, said parties have hereunto set their hands on this the day and year first hereinabove written.

(Signed)

ALBERT STEINFELD.

(Signed)

MARGARET FRANCIS.

(Signed)

JULIUS H. VOLKERT.

EXHIBIT 44.

This agreement made this 29th day of June, 1900, between Albert Steinfeld, and the Nielsen Mining and Smelting Company, a corporation organized under the laws of the territory of Arizona, parties of the first part, and Carl S. Nielsen and Mary Nielsen, his wife, the parties of the second part:

Witnesseth that the said parties of the first part in consideration of the transfer by said Carl S. Nielsen to Albert Steinfeld of three hundred shares of the capital stock of the Nielsen Mining and Smelting Company, and in consideration of the said parties of the second part executing their deed of quit claim and release of their interest
582 in and to certain mining claims as fully appear from certain quit claim deeds executed by said parties of the second part and one L. B. Lewis to Albert Steinfeld, and in further consideration of the sum of one dollar (\$1) by said parties of the second part in hand paid to the said parties of the first part, the receipt whereof is hereby acknowledged, do hereby agree that they will pay unto the said parties of the second part the sum of ten thousand dollars (\$10,000) lawful money of the United States, as soon as the said Nielsen Mining and Smelting Company will consummate a sale of its mining properties which are situate in the Silver Bell Mining District, Pima County, Arizona Territory, such sum to be paid within thirty (30) days after any such sale is completed.

Said parties of the first part further agree that in the event said Nielsen Mining and Smelting Company commence active operation in the said Silver Bell Mining District, and work, ship or reduce ores, that then and in that event the net profits which may arise to said company from its said working, shipping and operations, shall be applied first to the payment of the debts of said company; second, after said debts are paid, said net profits up to the amount of ten thousand dollars (\$10,000) shall be paid to the said parties of the second part, and upon full payment of said sum of ten thousand dollars (\$10,000) out of said profits, the parties of the first
 583 part hereto shall be released and relieved from any obligation to pay said parties of the second part a like sum of ten thousand dollars (\$10,000), or any part thereof in the event said Company consummates or completes a sale of its properties as hereinbefore agreed; this is to say, in no event shall said parties of the second part be paid more than said sum of ten thousand dollars (\$10,000).

In witness whereof, the parties hereto have hereunto placed their hands the day and year first above writ-en in triplicate.

(Signed) ALBERT STEINFELD.

(Signed) NIELSEN MINING AND SMELTING CO.,

By J. N. CURTIS, *President*.

(Signed) MARY NIELSEN.

(Signed) CARL S. NIELSEN.

DEFENDANT'S EXHIBIT K. K.

This agreement made this 20th day of May, A. D., 1903, between Albert Steinfeld of the city of Tucson, Arizona, the Mammoth Copper Company, the Silver Bell Copper Company, corporations of Arizona, by their presidents and secretaries hereunto duly authorized by their respective boards of directors, parties of the
 584 first part, and the Imperial Copper Company, a corporation of Arizona, by its board of directors, party of the second part,

Witnesseth, that, whereas, Albert Steinfeld acting for himself and the Mammoth Copper Company and the Silver Bell Copper Company, made a certain option agreement with George A. Beaton dated April 3, 1903, which option agreement was modified April 16, 1903, copies of which option agreement and the modification thereof are hereto attached and made a part hereof; and

Whereas, under said option agreement the party of the second part has become the nominee of the said George A. Beaton; and

Whereas, the parties of the first part have deposited deeds to certain mining claims first hereinafter enumerated, in which deeds the party of the second part is named as guarantee with the Phoenix National Bank, Phenix, Ariz., to be delivered to the party of the second part in accordance with escrow directions accompanying said deeds; and

Whereas, the party of the second part among other things, has agreed to purchase from the parties of the first part the mining claims hereinafter enumerated for the sum of \$515,000, and has this day

585 paid the sum of \$115,000 upon the said purchase price and has agreed to pay the balance thereof, to-wit: \$400,000 as in said escrow instructions, provided,

Now, therefore, in consideration of the sum of \$515,000, the purchase price named in said agreement, the parties of the first part hereto, jointly and severally, agree with the party of the second part, that they will, and they do hereby guarantee the titles to the following named mining claims and locations, situated in the Silver Bell Mining District, Pima County, Arizona Territory, to-wit: Mammoth Accident, Imperial, Murray, Emerald, Prospector, Hamilton, Silver Bell, Florence, Southern Beauty, Union, Comet Page, Yankee, Mollie, Anita, Herbert, Black Daisy, Pima, Apache, Papago, Omaha, Baltimore, Swansea, Detroit, Hilda, Millionaire, Trudie, Olympia, El Poso Queen, Confidence, John F. Belle, Pope, Leslie, Maggie, Spike, Frank B., Alliance, Northern Strip, Fraction Enterprise, for the period of one year from this date; that is to say: guarantee that all necessary assessment work on said locations has been done to the date hereof; that they are the first and valid locations; that the necessary location notices have been duly and properly executed and recorded; and that all of the said property, rights and interests are free from liens, encumbrances and claims. In addition to this guarantee, and for the

586 consideration above named, the parties of the first part jointly and severally agree that they will make or cause to be made application for United States patents for the mining claims situated in the Silver Bell Mining District, Pima County, Arizona, following to-wit: Mammoth Copper, Imperial, Prospector, Belle, Southern Beauty, Union, Comet, Page, Yankee, Herbert, Apache, Papago, Omaha, Baltimore, Swansea, Detroit, Confidence, Pope, Enterprise, Northern Alliance at the earliest practicable moment, and that they will prosecute with reasonable diligence the proceedings necessary to procure such patents to such mining claims in the name of either of the parties of the first part that may be most convenient; but in the event of the final payment of the purchase price, for the use and benefit of the party of the second part; and the parties of the first part jointly and severally guarantee the titles to each and all of the claims last mentioned herein until such time as final receipts for the purchase price of said mining claims have been issued and delivered by the proper officer of the U. S. government land office.

It is further agreed that the expense of patenting said claims, to the extent of three hundred and twenty-five dollars (\$325) for each claim only, is to be paid by the party of the second part; and it hereby binds itself so to do.

587 Any cost of litigation or other cost arising against said claims in excess of \$325 per claim, is to be borne by the parties of the first part, and they hereby bind themselves so to do.

In witness whereof, the Mammoth Copper Company and the Silver Bell Copper Company and the Imperial Copper Company have caused their corporate names and seals to be hereto attached by their respective presidents and secretaries; and Albert Steinfeld has here-

unto set his hand and seal the day and year above written. In duplicate.

MAMMOTH COPPER CO.,
By ALBERT STEINFELD, *President*,
THE IMPERIAL COPPER CO.,
By BEN GOODRICH, *President*,
A. N. GAGE, *Secretary*,
SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *President*,
R. K. SHELTON, *Secretary*,
ALBERT STEINFELD.

EXHIBIT 133.

This agreement made this 20th day of May, 1903, by and
588 between the Silver Bell Copper Company, a corporation
organized under the laws of the Territory of Arizona, by its
president and secretary, hereunto duly authorized by resolution of
its board of directors, and a resolution of its stockholders, the party
of the first party, and Albert Steinfeld of Tucson, Arizona, the
party of the second part, and the Mammoth Copper Company, a
corporation organized and existing under the laws of the Territory
of Arizona, by its president and secretary hereunto duly authorized
by resolution of its board of directors and a resolution of its stock-
holders, the party of the third part,

Witnesseth, whereas, the parties hereto have this day agreed to
sell to the Imperial Copper Company, a corporation, certain mining
claims and personal property, situated in the Silver Bell Mining
District, Pima County, Arizona Territory, for the sum of \$515,000
to be paid as follows: \$115,000 in cash, and the balance in four
equal payments of \$100,000 each, three, six, nine and twelve months
from the date hereof, with interest thereon until paid at the rate of
6 per cent. per annum, and for which deferred payments said com-
pany has executed and delivered its promissory notes, payable to
the order of said Silver Bell Mining Company; and the parties
hereto have placed in escrow their deeds in accordance with their
agreement with said Imperial Copper Company; and

Whereas, the parties hereto have signed, executed and de-
589 livered unto said Imperial Copper Company, a certain agree-
ment of even date herewith, designated as the "Guarantee
Agreement," wherein they and each of them did guarantee the titles
of the mining claims in said guarantee agreement mentioned, and
described in the manner and terms as therein set forth, a copy of
which said Guarantee agreement is hereto annexed; and the said
two corporations, parties hereto, are desirous of securing and in-
demnifying said Steinfeld, from any loss, charge or expense, that
might hereafter arise to him, by reason of his having signed and
executed said guarantee agreement; and

Whereas, said Steinfeld did on the 15th day of July, 1901, submit
an option proposition in writing to the said Silver Bell Copper Com-
pany, a copy of which said proposition is hereto annexed and made

a part hereof; and did thereafter on the first day of October, 1901, for certain considerations, extend the time within which said Silver Bell Copper Company could accept said option proposition; and

Whereas; said Steinfeld has renewed said option proposition with certain modifications, namely, that the moneys required to be paid on October 15, 1901, as in said option proposition set forth shall be forthwith paid him with interest thereon from October 15th, 1901,

to this date at the rate of 1 per cent per month, aggregating
590 \$18,117.00, and that the said Silver Bell Copper Company shall transfer to him the said four promissory notes aforesaid, aggregating \$400,000 as security for the faithful performance by it of the matters and things which it is to agree to do, if it accepts the said option proposition aforesaid; such notes also to be held by said Steinfeld as security and as indemnity against loss, charge or expense which may arise to him by reason of his having signed said guarantee agreement, guaranteeing the titles to the mining claims, or any of them, so agreed to be sold to said Imperial Copper Company, the deed of which is in escrow as aforesaid, as well as an indemnity to him against loss that might arise to him, said Steinfeld by reason of any obligation assumed by him in the matter of said sale, or by reason of any claim, or asserted claim of any person whatsoever against him, for or on account of or arising out of, or connected with the said sale and negotiations, or any past negotiations or transactions in regard to said mining claims or any of them; and

Whereas, the said Silver Bell Mining Copper Company has accepted said option proposition of said Steinfeld so modified and conditioned as aforesaid, and has agreed to make the payments and give the security and indemnity required, and whereas, the parties hereto, also desire to settle as between themselves in what manner
and to what purpose the purchase money paid and to be
591 paid by said Imperial Copper Company, upon the sale aforesaid, shall be held, applied and paid.

Now, therefore, the said Albert Steinfeld, in consideration of the premises, and of the sum of eighteen thousand one hundred and seventeen dollars (\$18,117) to him in hand this day paid by the said Silver Bell Copper Company, receipt whereof is hereby acknowledged, and in consideration of the premises and agreements of said Silver Bell Copper Company, as hereinafter set forth, by it to be kept and performed, and in consideration of the transfer to him for the purposes hereinafter set forth, of the four promissory notes, aggregating \$400,000 as hereinafter provided for, he does hereby agree:

First. Forthwith, to cancel as paid, a certain promissory note executed to him by the Mammoth Copper Company for \$2,780, dated June 8th, 1900, payable one year from date with interest thereon at the rate of 1 per cent per month.

Second. To hold the 1,000 shares of the capital stock of said Mammoth Copper Company, being all the shares of the capital stock of said corporation, and to hold the three hundred shares of the capital stock of said Silver Bell Copper Company, transferred or assigned

to him by Carl Nielsen and Mary Nielsen, his wife, under
592 their agreement of date June 29th, 1900, a copy of which
agreement is hereto annexed (and which said 300 shares
now stand in his name as trustee) and also to hold (subject how-
ever to the prior rights and interests of the Imperial Copper Com-
pany, as set forth in the agreements of sale to said company, and
subject to the deeds to said Imperial Copper Company, now in es-
crow) the mining claims and mill sites, conveyed to him, said Stein-
feld, by Frederick Clark Beckwith, Tucson Mining and Smelting
Co., Limited, and Herbert B. Tenney, by their deed dated August
21, 1900; and the mining claims conveyed to him by Carl S. Niel-
sen, Mary Nielsen and L. B. Lewis; and the interest in mining
claims conveyed to him by Margaret Francis, guardian, by deed
dated October 1, 1900, and also to hold the \$12,500 promissory note
and mortgage, executed to him by said Mammoth Copper Company,
of date June 8th, 1900, (said mortgage not being of record) as trustee,
for Silver Bell Copper Company, subject to the following trusts
and conditions, namely: that upon the said Silver Bell Copper
Company doing all the matters and things by said Steinfeld agreed
to be done and performed as set forth in his certain agreement with
Margaret Francis and Julius Volkert of date May 16th, 1900, and
upon said company paying to said Francis and Volkert, or their
assigns, the sum of \$12,500, as in said agreement of May 16th, 1900,
is provided shall be paid to them, and upon its paying to
593 said Carl S. Nielsen and Mary Nielsen, his, her or their
assigns, or personal representatives, the sum of \$10,000, as
is agreed to be done in said agreement with said Niensens of date
June 29th, 1900, then he, said Steinfeld, will transfer and assign
to said Silver Bell Copper Company, absolutely all of the 1,000
shares of the capital stock of said Mammoth Copper Company, and
all of said 300 shares of the capital stock of said Silver Bell Copper
Company; and will cancel, as paid, said promissory note for \$12,500
and the mortgage given as security therefor, and will convey to
said Silver Bell Copper Company, absolutely (provided, however,
that the deeds aforesaid, now in escrow are not delivered to said
Imperial Copper Company, and provided further, that said deeds
in escrow are first cancelled and destroyed by reason of said last
named Company having failed to make the payments as by the es-
crow required) all the right, title and interest acquired by him,
said Steinfeld, under the said deeds so executed to him by said Niel-
sens and Lewis, and the one executed to him by said Margaret
Francis, as guardian.

And the Silver Bell Copper Company hereby agrees, at its own
cost and expense, to do, and perform, or cause to be done and per-
formed all the matters and things, which said Steinfeld agreed to
do or perform, as set forth in his agreement with said Francis and
Volkert of date May 16th, 1900, aforesaid; and said com-
594 pany further agrees to pay said sum of \$10,000 to the said
Niensens, their assigns or personal representatives in accord-
ance with said agreement of June 29, 1900; and agrees to pay said

sum of \$12,500 to said Francis and Volkert, or their assigns, as in said agreement of May 16th, 1900, is provided shall be paid them.

And the said Silver Bell Copper Company and said Mammoth Copper Company do further agree to secure and indemnify the said Albert Steinfeld, against any and all loss, charge or expense that may arise to him, by reason of his having guaranteed or agreed to guarantee the titles to certain of the mining claims so sold, aforesaid, to the said Imperial Copper Company or by reason of his having signed and executed the guarantee agreement aforesaid, or that may arise to him by reason of, or out of any obligation assumed by him in the making of said sale, or by reason of or out of any claim, or asserted claim of any person whatsoever, against him for or on account of or connected with said sale or the negotiations resulting in said sale, or any past negotiation or transaction, in regard to said mining claims, or any of them; and also to secure him against any loss, charge or expense, which may arise to him, by reason of the failure of the said Silver Bell Copper Company to do or perform any of the matters or things which herein have

595 been or may be, by it agreed to be done or performed. And to this end, and to secure and indemnify said Steinfeld, as aforesaid, all of the parties hereto agree as follows: That the sum of one hundred and fifteen thousand dollars (\$115,000), this day paid by said Imperial Copper Company on account of the purchase price of the mining claims and property by the parties hereto this day sold to said company, shall be paid to said Silver Bell Copper Company, and that it shall apply said money as follows:

First. It shall pay the sum of \$18,117, thereof to said Albert Steinfeld, being the amount said Silver Bell Copper Company is required to pay to him under the option proposition aforesaid, and which amount it does hereby pay him, the receipt whereof said Steinfeld has hereinbefore acknowledged.

Second. It shall pay the sum of twenty-two thousand five hundred dollars (\$22,500) thereof to N. O. Murphy as his commissions upon the said sale to the Imperial Copper Company.

Third. The remainder thereof it shall pay on account of indebtedness at present due and owed by it, said Silver Bell Copper Company, to its creditors.

It is further agreed by and between the parties hereto, that the four certain promissory notes, this day executed and delivered by said Imperial Copper Company, each of said notes bearing even date herewith; payable three, six, nine and twelve months respectively from date, to the order of the Silver Bell Copper Company, each for \$100,000, with interest at the rate of six per cent per annum until paid, shall each be endorsed by said Silver Bell Copper Company, payable to the order of Albert Steinfeld, the same and all proceeds and sums of money that may be paid thereon, to be by him kept and held subject to the following trusts and terms and provisions, that is to say:

First. He shall present for payment and collect the money due and to become due on each of said promissory notes as each becomes payable, and if the said promissory notes, or any of them be not

paid when due, then he shall take such proceedings or do such other matters or things, in regard thereto, as he and said Silver Bell Copper Company may jointly and mutually agree on.

Second. Out of the first moneys so collected or received by him, he shall pay:

1. All the debts of said Silver Bell Copper Company then due and unpaid, and if any such debts be not then due, he shall retain sufficient of said moneys to pay the same when they do become due.

2. He shall pay to Mary Nielsen, her assigns or legal representatives, and to the assigns or legal representatives of Carl S. Nielsen (said Carl S. Nielsen being now deceased) the sum of ten thousand dollars (\$10,000) in accordance with the terms and provisions of the said agreement with said Niensens of date June 29th, 1900.

3. He shall retain and pay, when due and payable, the sum of twelve thousand five hundred dollars (\$12,500) to Julius H. Volkert and Margaret Francis, or their assigns or legal representatives, in accordance with the terms and provisions of the said agreement with said Volkert and Francis of date May 16th, 1900.

Third. All the rest, remainder and balance of the moneys collected and received by him, upon said promissory notes aforesaid, he shall hold and retain as security and indemnity against any loss, charge or expense that may arise to him by reason of his having guaranteed the titles to mining claims, sold or agreed to be sold to said Imperial Copper Company, or that may arise to him by reason of his having signed and executed the said guarantee agreement aforesaid or which may arise to him by reason of, or out of any of the matters, or things, as to which the said two corporations, parties hereto, have hereinbefore agreed to secure and indemnify him against loss, damage or expense.

Fourth. At the expiration of one year from the date hereof, to-wit, on May 21, 1904, provided, however, that prior to that date,

598 there has been issued by the proper officer of the United States government land office final receipts upon the applications for patent to those certain mining claims which the parties hereto in said guarantee agreement aforesaid, have agreed to have patented; or if said final receipts have not by said date been issued, then upon the date of the issuance of said final receipts, and provided further that up to said time said Steinfeld has not been caused any further loss, damage or expense, by reason of any of these matters or things for which he holds the money and funds aforesaid as security and indemnity, and provided further that there be not then pending or existing any further liability for or on account of the matters and things for which he holds said money and funds as indemnity, as aforesaid, or upon the date of the issuance of said final receipts aforesaid, said Steinfeld shall repay to said Silver Bell Copper Company, the moneys and funds then remaining in his hands, and shall transfer and deliver to it any and all of said promissory notes then remaining unpaid.

Fifth. In the event the liability of said Steinfeld for and on account of said matters and things shall not be terminated on said

21st day of May, 1904, or on the subsequent date when said final receipts are issued, then he shall retain all of said money, funds and unpaid promissory notes (if any) in his hands, as security and indemnity until such a time as he is no longer liable to loss, damage or expense, for or on account of any of said matters and things aforesaid.

Sixth. In the event said Steinfeld shall suffer any loss, damage, or expense, for or through or by reason of any of the matters or things to indemnify which loss, damage, or expense to him he holds, and is to hold, said notes and the money that may be paid thereon then and in such event, he is authorized to repay unto himself and to retain for his own use and benefit, out of any of said money or funds so in his hands, the sums and amount of his said loss, damage and expense.

This agreement shall bind the successors and assigns of the said corporations, parties hereto, and the heirs, successors in trust, assigns, administrators and executors of the said Albert Steinfeld.

In witness whereof, the said Silver Bell Copper Company has by resolution of its board of directors caused its corporate name to be hereto attached and its corporate seal to be hereto affixed by its president and secretary, and the said Albert Steinfeld has hereunto placed his hand and seal, and the said Mammoth Copper Company has, by a resolution of its board of directors, caused its corporate name to be hereunto attached and its corporate seal to be hereto affixed by its president and secretary the day and year first above written. In triplicate.

600

SILVER BELL COPPER CO.,

By J. N. CURTIS, *President*,— — —, *Secretary*.

MAMMOTH COPPER CO.,

By — — —, *Secretary*.

This agreement made this 20th day of May, 1903, by and between the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, by its president and secretary hereunto duly authorized by resolution of its board of directors, and a resolution of its stockholders; the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, by its president and secretary hereunto duly authorized by resolution of its board of directors, and a resolution of its stockholders, and Albert Steinfeld, of the city of Tucson, Pima County, Arizona Territory, parties of the first part, and the Imperial Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, by its president and secretary hereunto duly authorized by resolution of its board of directors, the party of the second part, witnesseth:

601

Whereas, said Albert Steinfeld, for himself, and on behalf of said Silver Bell Copper Company and said Mammoth Copper Company did in certain written option agreements of date April 3, 1903, and April 16th, 1903, agree to sell to George A. Beaton or his assigns, for the price and upon the terms therein

set forth, all those certain mining claims and property situate in the Silver Bell Mining District, in Pima County, Arizona Territory, and in said option agreements, and hereinafter described; which said option agreements and modifications thereof have been duly ratified and approved by each of said corporations, of the parties of the first part, aforesaid; and

Whereas, under said option agreements and modifications thereof, the party of the second part hereto has become and is the nominee of George A. Beaton, the said party of the second part is desirous of availing himself of said option to purchase, and desires to purchase said properties aforesaid;

Now therefore, in consideration of the premises, and the promises and agreements of said party of the second part, as hereinafter set forth, to be by it kept and performed, said parties of the first part hereby agree to sell unto said party of the second part, for the price and upon the terms and conditions set forth in the said option agreements and modification thereof, aforesaid, all those certain mining claims, situate in the Silver Bell Mining District, 602 in Pima County, Arizona Territory, known and designated as follows, to-wit:

Mammoth Copper, Herbert Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell Swansea Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Poso, Fraction, Anita, Queen, Enterprise, also all other mining claims, mill sites and locations which said parties of the first part, or either of them, or they or either any of their representatives have, or possess, in said Silver Bell Mining District, and not above enumerated, also all of the property and plant, machinery, appliances, supplies, store goods, live stock and everything at present belonging to said mining claims and which is the property of either said Silver Bell Copper Company, or said Mammoth Copper Company.

And said parties of the first part further agree to make and execute, or cause to be made and executed, to said party of the second part, conveyances, transfers and bills of sale sufficient to convey all the above mining claims, property, interest and right to said party of the second part, and to place the same in escrow with the Phoenix National Bank of Phoenix, Arizona, in accordance with the 603 terms and provisions of said option agreements and modification thereof aforesaid.

In consideration thereof said party of the second part hereby agrees to purchase all said mining claims and property aforesaid, and to pay for the same the purchase price in the manner and times as set forth in said option agreements and modification thereof, aforesaid.

Said parties of the first part further agree that said party of the second part shall have the right to enter into immediate possession of all said mining claims and property aforesaid, and have and re-

tain the exclusive possession of all said mining claims and property aforesaid, and have and retain the exclusive possession of all said mining claims and property, and may work and operate the same and ship and reduce the ores thereof, for its own use and benefit, so long as it, said party of the second part, shall make the payments of said purchase price, in the manner, amounts and times as provided for in said option agreements and modification thereof aforesaid, and as by it herein agreed it will do.

Said party of the second part further agrees, at its own cost and expense, to do and perform upon all said mining claims
604 aforesaid, the annual assessment work for the year 1903; and in the event it fails so to do, said parties of the first part, or any of them, shall have the right to have the same done, but the expense thereof shall be paid by said party of the second part.

In witness whereof, the Mammoth Copper Company has caused its corporate name to be hereto attached and its corporate seal to be hereto affixed by its president and Secretary, and the Silver Bell Copper Company has caused its corporate name to be hereto attached and its corporate seal to be hereto affixed by its president and secretary, and the said Albert Steinfeld has hereunto subscribed his name and affixed his seal; the Imperial Copper Company has caused its corporate name to be hereto attached and its corporate seal to be hereto affixed by its president and secretary, the day and year first above written. In duplicate.

MAMMOTH COPPER CO.,

By ALBERT STEINFELD, *President*,

ALFRED S. DONAU, *Secretary*,

SILVER BELL COPPER COMPANY,

By J. N. CURTIS, *President*,

R. K. SHELTON, *Secretary*,

ALBERT STEINFELD,

THE IMPERIAL COPPER CO.,

By BEN GOODRICH, *President*,

A. N. GAGE, *Secretary*.

EXHIBIT J.

In the Superior Court of the City and County of San Francisco,
State of California.

LOUIS ZECKENDORF, Plaintiff,

VERSUS

ALBERT STEINFELD, BANK OF CALIFORNIA, a Corporation; SILVER
Bell Copper Company, a Corporation; J. N. Curtis and R. K.
Shelton, Defendants.

Complaint.

Plaintiff complaining of the Defendants, avers:

I.

That at all of the times herein mentioned, defendant Bank of California was, and it ever since has been a corporation organized and existing under the laws of the State of California.

II.

That at all times herein mentioned, defendant Silver Bell Copper Company was, and it ever since has been a corporation organized and existing under the laws of the Territory of Arizona, with a capital stock of 1,000 shares of the par value of twenty-five (\$25) dollars each, of which seven hundred shares are outstanding that the remaining 300 shares belong to the corporation and are registered upon its stock books in the name of defendant Steinfeld as trustee.

That the plaintiff is the owner of 250 shares of said stock; that the board of said company consists of three directors, namely, defendants Steinfeld, Curtis and Shelton. That but one share of stock is registered in the name of said Shelton, and that said Steinfeld claims to be, and plaintiff alleges him to be the owner of said one share. That at all the times herein mentioned said Curtis was president of said Shelton secretary of said Silver Bell Copper Company, and they still are such president and secretary.

III.

On information and belief that heretofore said Silver Bell Copper Company agreed to sell to the Imperial Copper Company, an Arizona corporation, and said Imperial Copper Company agreed to buy from said Silver Bell Copper Company, the mines and other property of said Silver Bell Copper Company for the sum of five hundred and fifteen thousand dollars (\$515,000) whereof one hundred and fifteen thousand dollars (\$115,000) was paid in cash to said Steinfeld at the time of making said agreement and for the balance whereof said Imperial Copper Company delivered to said Steinfeld its four (4) promissory notes, each dated May 20th, 1903, each

calling for the payment of one hundred thousand dollars (\$100,000) with interest from said date at the rate of six (6) per cent. per annum; that said notes were made payable three, six, nine and 12 months after date respectively; that the name of the payee in all of said notes was left blank, but said notes were delivered by said Imperial Copper Company to said Steinfeld; that thereupon a deed conveying the properties of said Silver Bell Copper Company was placed in escrow, to be delivered to said Imperial Copper Company upon the payment of all of said notes.

IV.

That in addition to said one hundred and fifteen thousand dollars (\$115,000) cash, said Steinfeld has received the proceeds of the two of said notes first maturing, namely \$101,500 and \$103,000. That said Steinfeld has placed a large sum of money, part of the proceeds of said notes, (the amount whereof is at least \$50,000) and the two of said notes maturing respectively February 20, 1904 and May 20, 1904, with defendant Bank of California to his individual credit. That said Steinfeld has in his own name for his own benefit, loaned out a large part of the balance of said moneys already collected under said notes. That said Steinfeld claims the right to hold all the moneys so collected and the notes now in the said Bank of California as against said Silver Bell Copper Company and the officers and the shareholders thereof and has demanded from said bank the payment of said moneys and the surrender of said notes; and said Steinfeld bases his said claim to hold said moneys and said notes for his own account, upon alleged resolutions attempted
607 to be passed by the board of directors of said Silver Bell Copper Company, which pretended resolutions purport to authorize the execution of some agreement or agreements between said Silver Bell Copper Company and said Steinfeld. That said pretended resolutions do not set forth the terms of said agreements, and neither the said agreements nor the substance thereof is set out in the minutes of said board, except as follows:

"Resolved, that the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be and the same is hereby ratified, approved and confirmed," and except that there appears in said minutes the following resolution:

Resolved that the president and secretary of this company be, and they are hereby authorized, empowered and directed, in such manner and form as they deem necessary or proper, to indemnify said Albert Steinfeld against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the property so sold or agreed to be sold to the said Imperial Copper Company, and that he and they hereby are authorized, empowered
608 and directed to do or cause to be done all things and to execute all papers, documents which they may deem necessary in the premises.

That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at all, in that said Steinfeld joined in the vote therefor, and that the other two directors are in the employ of said Steinfeld and wholly under his control, and in that said Shelton does not own any shares of said corporation; and in that they were pretended to be adopted at the instigation of said Steinfeld, and as a part of a scheme on his part to defraud said company and its shareholders. And plaintiff expressly avers that said two other directors and defendants, Curtis and Shelton, then and always were, and still are acting solely in the interest of, and are under the complete control and domination of said Steinfeld, and blindly and without consideration of the interests of said corporation, carry out all of his directions. That they are disregardful of the interests of the corporation as against the interests of said Steinfeld.

V.

That it would be a futile and vain proceeding for this plaintiff to demand of said board of directors to take proceedings on behalf of said Silver Bell Copper Company against said Steinfeld to recover the moneys and notes so wrongfully withheld by him and which he claims to have the right to hold as against said corporation, 609 or to rescind said last mentioned agreements or resolutions, because said directors and defendants, Curtis and Shelton, are acting solely in the interest of and are under the sole control of said Steinfeld, and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised.

That the office of said Silver Bell Copper Company is in Tucson, Arizona Territory, and said defendants Curtis and Shelton now are, and they reside in the Territory of Arizona, but the minute book of the said corporation was sent out of said Territory. That said Steinfeld has in his possession, exclusive of said funds and notes in said Bank of California, ample funds to protect him against any possible liability which he may have incurred on behalf of or with reference to said Silver Bell Copper Company or the guaranty of titles to property sold by it or otherwise.

VI.

That said Steinfeld resides in said Tucson, and has demanded from said Bank of California, the surrender of said moneys and notes now in its possession, and threatens to bring proceedings against the said bank for withholding of same. That unless said Steinfeld and said Bank of California be restrained, said 610 Steinfeld will obtain possession of said moneys and notes in said Bank of California and remove them from this State and the jurisdiction of this court, and the same will be in danger of being lost to said Silver Bell Copper Company and to its shareholders.

That prior to the commencement of this action, plaintiff offered to said Steinfeld to refrain from these proceedings if said Steinfeld would agree to allow said money and said notes or the proceeds thereof, to remain in said Bank of California or other bank of approved standing, for the benefit of said Silver Bell Copper Company, but for the protection of said Steinfeld against any liability incurred by him for the benefit of said Silver Bell Copper Company, or if said Steinfeld would furnish a sufficient bond in favor of said Silver Bell Copper Company to faithfully account for said moneys and said notes in said Bank of California, but each of said propositions has been rejected by said Steinfeld; that plaintiff has also requested of said Steinfeld that plaintiff in view of his large interest in said corporation, be elected a director thereof, but said Steinfeld has also refused said request. And plaintiff further avers on information and belief, that said Steinfeld has caused a collusive suit to be brought against the Silver Bell Copper Company for fifty thousand (\$50,000) dollars, and a collusive garnishment to issue therein, but said Steinfeld has more than sufficient funds belonging
611 to said company and in his possession, exclusive of the funds and notes in said Bank of California, to cover the amount of said garnishment.

That this suit is brought for the benefit of said Silver Bell Copper Company and of all the shareholders thereof, and because as aforesaid, it would be futile and impracticable to demand of the board of directors of said corporation that action be taken by it against said Steinfeld, or to secure any of the relief herein prayed for.

VIII.

That said Steinfeld is not financially responsible to the extent of the amount of moneys and notes so withheld by him, and plaintiff has no adequate remedy at law. That if said Steinfeld be allowed to withdraw said moneys and said notes from said Bank of California, said Silver Bell Copper Company and its stockholders will suffer irreparable loss and any judgment rendered herein against said Steinfeld will be wholly ineffectual.

Wherefore, plaintiff prays,

1. That a receiver be appointed to hold said moneys and said notes in said Bank of California, for the benefit of the said Silver Bell Copper Company, during the pendency of this suit.

612 2. That an injunction issue restraining said Steinfeld from receiving and said Bank of California from delivering to him said moneys or said notes now in the custody of said Bank of California.

3. That said Steinfeld be required to set forth the nature of his claim to said moneys and said notes, and the terms of the agreements referred to in said resolutions, and to account to said Silver Bell Copper Company for moneys received or that may hereafter be received by him belonging to said corporation.

4. That said resolutions and the agreements therein referred to, be declared null and void.

5. And that the plaintiff have such other and further relief as may be just in the premises, together with the costs of this suit.

JESSE W. LILIENTHAL,

Attorney for Plaintiff.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Louis Zeckendorf being duly sworn, deposes and says: That he is the plaintiff in the above entitled action. That he has read the above and foregoing complaint and knows the contents
613 thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief; and as to those matters, that he believes it to be true.

LOUIS ZECKENDORF.

Subscribed and sworn before me, this 8th day of December, 1903.

[SEAL.]

ALFRED A. ENQUIST,

*Notary Public in and for said City and County
of San Francisco, State of California.*

EXHIBIT S.

This agreement made this 26th day of December, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth: that

Whereas, on the 20th day of May, 1903, the parties hereto executed a certain agreement in the words and figures following, to-wit:

This agreement made on the 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the
614 first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part and Albert Steinfeld, of Tucson, party of the third part, witnesseth:

Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phoenix, Arizona; and

Whereas, the parties hereto desire to settle and determine as between themselves what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with said Imperial Copper Company as more fully appears in

the various agreements heretofore entered into by him in making such sale, and particularly in a certain guarantee agreement wherein amongst other things, said Steinfeld guarantees the titles to certain mining claims so sold or agreed to be sold, and parties of the first and second part desire to indemnify him against loss by reason of any of said matters or things so done by him;

Now, therefore, in consideration of the premises and of the sum of one dollar (\$1.00) by each of the parties hereto to the
615 other in hand paid, the receipt whereof is hereby acknowledged it is hereby mutually agreed, that the purchase price paid and to be paid upon the said sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld, as trustee, and as security for, and as indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or by any other person whatsoever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporation, parties of the first and second part, have caused these presents to be signed by its
616 president and secretary and its corporate seal to be hereto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate.

And whereas, an action has been brought by Louis Zeckendorf and is now pending in the Superior Court of San Francisco, State of California, on behalf of the said Silver Bell Copper Company to rescind the said agreement, and declare the same null and void; and

Whereas, the parties of the second and third part have indicated their willingness to assent to a rescission of the said agreement; and

Whereas, the party of the third part did, in pursuance of said agreement, receive the four promissory notes of \$100,000 each referred to in said agreement; and

Whereas, two of said notes have matured and have been paid; and

Whereas, the remaining two said notes have been deposited by the said Albert Steinfeld for Collection with the Bank of California, city of San Francisco, and are now held by said bank; and

Whereas, the said Albert Steinfeld has received all of the proceeds of the said two notes which have been paid as aforesaid.
617 except the sum of \$49,987.50, which is held by the Bank of California, and has paid out certain of said money for and on behalf of the said Silver Bell Copper Company as appears by a

statement rendered by said Steinfeld to said company, the party of the first part hereto; and

Whereas, the said Steinfeld has returned and paid to the treasurer of the Silver Bell Copper Company the sum of \$18,117, which was part of the consideration for the execution of the said agreement, and has given to the said Silver Bell Copper — an order upon the Bank of California for the two notes held by it and for the said sum of \$49,987.50, the balance of the proceeds of the notes collected by said bank and in its hands as aforesaid, and has returned and paid over to the said Silver Bell Copper Company, party of the first part, all of the proceeds of the said notes remaining in his hands except such sums as have been paid out for or on behalf of the Silver Bell Copper Company as aforesaid, and except the sum of \$51,500, which has been garnisheed in his hands in a certain suit brought against the Silver Bell Copper Company by Selim M. Franklin of the city of Tucson;

Now, therefore, in consideration of the premises and of one dollar by each party in hand paid to the other, receipt whereof is hereby acknowledged, the parties hereto mutually agree as follows:

618 The said agreement bearing date May 20, 1903, between the parties hereto and heretofore recited in full, is hereby rescinded and declared null and void ab initio.

In witness whereof, the said corporation, parties of the first and second part, have caused these presents to be signed by their president and secretary respectively, and their respective corporate seals to be hereunto affixed by resolution of their boards of directors, and the said Albert Steinfeld has hereunto placed his hand and seal, the day and year first above written. In triplicate.

SILVER BELL COPPER CO.,

By J. N. CURTIS, *President*.

R. K. SHELTON, *Secretary*.

MAMMOTH COPPER CO.,

By ALBERT STEINFELD, *President*.

By ALFRED S. DONAU, *Secretary*.

ALBERT STEINFELD.

In presence of

J. B. HENDERSON.

Tucson to New York, Dec. 19, 1898.

Steinfeld to Zeckendorf.

PLAINTIFF'S EXHIBIT 7.

619 Mr. Thompson, superintendent for Lewishon, called a few days ago with instructions to examine the Old Boot mine of Uncle William. I had not heard from him about this but gave him a letter to the lessees, Mrs. C. S. Nielsen. I did not see him on his return, but I hardly believe the property will suit anyone unless possibly in connection with others. The Niensens are getting along fairly well, though they have many obstacles to over-

come. They will have another car bullion in a few days which would have gone sooner but for accident to their boiler. We are doing well with them and I believe within next sixty days will be out of debt.

Tucson to New York, Jan. 16, 1899.

Same to Same.

EXHIBIT 8.

We incorporated the Nielsen Mining and Smelting Company and retained three-eighths of the stock, Curtis one quarter and the Nielsens three-eighths and I believe chances favorable to develop something out of same. They are doing a lot of developing on Old Boot, but getting no ore there just now. You might see Uncle William and see what he will take for same and what condition he will put it in with others. I am trying to get an option to purchase from the Red Rock Copper Company where they are now taking ore from and it looks very encouraging. With the high price of copper and the possible pool being formed, mines of this kind ought
620 to be in demand.

Tucson to New York, Jan. 8, 1899.

EXHIBIT 9.

The Nielsens are shut down for a few days. The ore body in Old Boot is very limited and insufficient to keep the furnace going. They are now getting ores from the Atlas and Red Rock group and will start next week again.

Inasmuch as we have to make all the advances and carry the risk to a certain extent, I am going to form a company to operate the concern and give the Nielsens one-half of the stock and we retain the other half and have Curtis look after our interests and protect us. I am satisfied the thing will come out all right in very short order. The provisional leases they have of the Red Rock Company I am going to have changed with options to purchase, and on long terms, so if the mines develop anything we can take advantage of same in finding a customer. There is no trick in placing a good copper mine today and you cannot tell what any may turn into when worked.

Tucson to New York, Jan. 27, 1899.

Same to Same.

EXHIBIT 10.

Nothing.

EXHIBIT 11.

Assignment of stock by Nielsen to L. Zeckendorf and Company, 529 shares to J. N. Curtis 169 shares. Assignment dated January 14, 1899, in Franklin's handwriting and witnessed by Franklin.

EXHIBIT 12.

Pages 3 to 15 Minute Book of Silver Bell Copper Company.

First meeting of the board of directors of the Nielsen Mining and Smelting Company was held at the office of said company on January 14th, 1899, at 11 o'clock a. m. of said day in the city of Tucson, Pima County, Arizona.

The following directors being stockholders of one share of stock of said corporation and being designated as directors by the articles of incorporation, were present at said meeting, to-wit:

J. N. Curtis, director; Carl S. Nielsen, director; Ralph K. Shelton, director.

The meeting was called to order by J. N. Curtis, temporary president, who stated that the first business to be transacted was the election of officers according to the Articles of Incorporation.

On motion J. N. Curtis was unanimously elected president and treasurer of the corporation; Carl S. Nielsen was unanimously elected vice president of the corporation and Ralph K. Shelton was unanimously elected secretary thereof and the various officers then resumed their respective offices.

On motion the following by-laws were unanimously adopted, to-wit:

By-Laws of the Nielsen Mining and Smelting Company.

Article I.

Election of Directors.

The directors shall be elected by the stockholders at the annual meeting of the stockholders on the second Monday of January in each year and shall hold their office until their successors are elected and qualified. Their terms of office shall be immediately after election.

Article II.

Vacancies.

Vacancies in the board of directors shall be filled by the directors in office and such persons shall hold office until the first meeting of the stockholders thereafter, and until their successors are elected and qualified.

623

Article III.

Power and Duties of Directors.

The board of directors shall have power:

1. To call special meetings of the stockholders when they deem it necessary. And they shall call a meeting at any time upon the written request of the stockholders holding at least one-h. of the capital stock.

2. To appoint and remove at pleasure (except as otherwise provided in the Articles of Incorporation or in these by-laws) all officers, agents and employes of the corporation, prescribe their duties, fix their compensation, and require from them security for faithful service if they deem it necessary.

3. To conduct, manage and control the affairs and business of the corporation and to make rules and regulations not inconsistent with the laws of the Territory of Arizona or the By-laws of this corporation for the guidance of the officers and management of the affairs of the corporation.

4. To incur indebtedness; provided, however, that no indebtedness in excess of the sum of twenty-five thousand dollars (\$25,000) shall ever be incurred.

It shall be the duty of the board of directors:

624 1. To cause to be kept a complete record of all their minutes, acts and proceedings and of the proceedings of the shareholders, and to present a full statement at the annual meeting of the stockholders, showing in detail the assets and liabilities of the corporation and generally the condition of affairs. A similar statement shall be presented at any other meeting of the shareholders when thereunto required by persons holding at least one-half of the capital stock of the corporation.

2. To declare dividends out of the surplus profits when such profits shall in the opinion of the directors, warrant the same.

3. To supervise all officers, agents and employes and see that their duties are properly performed.

4. To cause to be issued to the shareholders the number of shares of stock each may be entitled to, provided, however, that no certificate for any share or shares of stock shall be issued until the par value thereof is first paid unto the treasurer of this corporation.

Article IV.

Officers.

The officers shall be a president, vice president, secretary treasurer and superintendent.

625 The board of directors shall elect one of their own number to be president, one to be vice president, and one to be treasurer. Said president, vice president and treasurer shall hold office until the annual election of directors by the stockholders and until their successors are elected.

The secretary and superintendent shall be elected by and hold office at the pleasure of the board of directors.

The compensation of all officers of this corporation, if any compensation is to be allowed, shall be fixed and determined by the board of directors. Any director may hold more than one office.

Article V.

President.

The duties of the president shall be:

1. To preside over all meetings of the stockholders and directors.

2. He shall sign as president all certificates of stock and all contracts and other instruments in writing which have been first duly approved by the board of directors.

3. He shall call the directors together whenever he deems it necessary, and shall have, subject to the advice of the directors direction and control of the affairs of the corporation and all its officers and employes and generally shall discharge such other duties as may be required of him by the by-laws of the corporation.

4. The president or two of the directors may call special meetings of the directors at any time, upon giving notice to all directors who are in the Territory of Arizona.

5. He may call a special meeting of the stockholders, whenever he deems it necessary upon giving notice required by the by-laws

Article VI.

Vice President.

In the absence of the president the vice president shall preside at all meetings of the directors and stockholders.

Article VII.

Treasurer.

The treasurer shall receive and keep all funds of the corporation. He shall deposit such funds in such bank, or banks as may be designated by the board of directors.

He shall pay all claims and demands against the corporation which have been first duly audited and allowed by the board of directors.

627 He shall keep exact books of account and shall perform such other duties as may be prescribed by the by-laws or by the board of directors.

Article VIII.

Superintendent.

It shall be the duty of the superintendent:

1. To take charge of all the property belonging to the corporation, and, under the supervision of the board of directors, and of the president, to control and direct the business operations of the company at its mines and reduction works.

Any member of the board of directors may be appointed to serve as superintendent.

2. He shall make monthly reports to the president of all persons hired or employed by him and a statement of all expenditures, and shall make such other reports as the board of directors or president may require.

3. He shall receive such compensation as the board of directors may by resolution provide.

Article IX.

Secretary.

628 The board of directors shall elect a secretary to keep a record of the proceedings of the board of directors and of the stockholders.

2. He shall keep the corporate seal of the corporation and the book of bank certificates, fill up and countersign all certificates issued and make the corresponding entries in the margin of such book of issuance; and he shall affix such corporate seal to all papers requiring a seal.

3. He shall keep a proper transfer book and a stock ledger in debit and credit form, showing the number of shares issued to and transferred by any shareholders and the dates of such issuance and transfer.

4. He shall keep proper account books and discharge such other duties as pertain to his office and as may be prescribed by the board of directors.

5. The secretary shall serve all notices required either by law or the by-laws of the company; and in case of his absence, inability, refusal or neglect so to do, then such notices may be served by any person thereunto directed by the president.

Article X.

Stock.

629 Certificates of stock in such form and device as the board of directors may direct shall be issued to each subscriber for the capital stock of this corporation, for the number of shares subscribed and paid for by him. Each certificate of stock shall be signed by the president and countersigned by the secretary and express on its face its number, date of issuance, the number of shares for which and the person to whom it is issued.

Article XI.

Transfer of Stock.

Shares of the corporation may be transferred at any time by the holders thereof, or by attorney legally constituted, or by their legal representative, by endorsement on certificate of stock, but no transfer shall be valid until the surrender of the certificate and the acknowledgment of such transfer on the books of the corporation is made.

No surrender of certificates shall be cancelled by the secretary before a new one is issued in lieu thereof; and the secretary shall preserve the certificate so cancelled as a voucher.

If, however, a certificate shall be lost or destroyed the board of directors may order a new certificate to be issued upon such guarantees being given by the parties claiming the same as they may deem satisfactory.

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Article XII.

Books and Papers.

The books and such papers as may be placed on file by vote of the shareholders or directors, shall at all times in business hours be subject to the inspection of the board of directors and of any shareholder.

Article XIII.

Contracts.

No contract shall be made or entered into by any officer of the corporation, shall be valid or binding upon the corporation without the previous authorization or subsequent ratification of the board of directors.

Article XIV.

Meetings of Stockholders.

The annual meeting of the shareholders shall be held at Tucson, Pima County, Arizona Territory on the second Monday of January in each year, each year.

No meeting shall be complete to transact business unless a majority of the stock is represented, except to adjourn from day to day, or until such time as may be deemed proper.

At such annual meeting of the stockholders, directors for
631 the ensuing year shall be elected to serve for one year and until their successors are elected.

If, however, for want of a quorum, or for any other cause, a stockholders' meeting should not be held on the day above named, or should such meeting be held and the stockholders fail to complete their election, or such other business as may be presented for their consideration, those present may adjourn from day to day, or until such future day as they may deem necessary, when such election shall be held and such other business transacted.

Special meetings of the stockholders may be called by the board of directors or by the president of the company and notice thereof shall be given, either by publication in a newspaper published in Tucson, for the period of at least five days before such meeting is held, or by serving written notice on each stockholder, by depositing such notice in the postoffice at Tucson, addressed to such stockholders, postage prepaid, at his last known address such notice to be so deposited at least five days before said meeting is held.

Article XV.

Voting.

At all corporate meetings, each shareholder, either in person or by proxy, shall be entitled to as many votes as he owns
632 shares of stock. Such proxy shall be in writing and filed with the secretary.

Article XVI.

Amendments.

These by-laws may be amended at any meeting of the stockholders, or by a majority vote of the stock represented at such meeting, or by two-thirds vote of the directors at any directors' meeting.

Carl S. Nielsen made a proposition to the corporation to sell his certain smelting plant on or near the Mammoth Copper mill site, in the Silver Bell Mining district, Pima County, Territory of Arizona, to-wit: All the machinery, tools, appliances and personal property owned and used by him on or about or in connection with said smelting plant, and also all leases and licenses to work mines or mining claims in the said Silver Bell Mining District which he now has, in consideration of the corporation issuing to him nine hundred and ninety-seven (997) shares of its capital stock full paid up and non-assessable, and also upon the company assuming the payment of certain indebtedness, a list of which he then presented, a large portion of which indebtedness are secured by copper bullion in transit his equity in which he also agreed to assign.

On motion duly seconded, it was unanimously agreed to 633 accept the proposition of Mr. Nielsen as above set forth, and it was further ordered that the secretary issue to him nine hundred and ninety-seven shares of the full paid up capital stock of this corporation upon his delivering a good and sufficient bill of sale and assignment conveying all of the above property aforesaid to this corporation.

A recess was taken for five minutes.

Upon reassembling, the president reported that Mr. Carl S. Nielsen had delivered unto him for the corporation his bill of sale conveying to the corporation, all of the property, leases and licenses, smelting plant, etc., offered to be sold and conveyed by Mr. Nielsen as above set forth.

He further reported that he had issued to Mr. Nielsen a certificate to the effect that Mr. Nielsen was to receive nine hundred and ninety-seven (997) shares of the capital stock of this corporation as soon as his stock books were obtained and the same could be issued.

And he further reported that the list of indebtedness assumed by this corporation under the proposition aforesaid of Mr. Nielsen's were as follows:

L. Zeckendorf & Co.	\$16,608.27
L. Zeckendorf & Co.	826.25
W. & P. (Wheeler & Perry)	2,027.37
634 C. T. Etchells	110.00
C. F. Schumacher	160.00
W. J. Corbett	75.00
Gardner, Worthen Goss	438.85
J. Dobson	20.00
Employees	1,221.12
Total	\$22,886.86

He further reported that the sum of these indebtednesses were secured by large shipments of copper bullion in transit.

On motion the report of the president was accepted and his actions in the premises were ratified and approved.

On motion it was unanimously resolved that this corporation take immediate charge and control of the smelting plant and property so purchased by it, and that it continue the mining operations thereat.

On motion it was unanimously agreed that Carl S. Nielsen be elected superintendent of the corporation and act as such for the period of one year in consideration of his receiving board for himself and wife at the smelting plant of the corporation and in addition thereto all his necessary traveling and incidental expenses while attending to business of the company, are to be paid by it.

635 Mr. Nielsen accepted the office on the foregoing terms.

Upon motion the meeting adjourned subject to the call of the president.

(Signed)

J. N. CURTIS, *President*.

Attest:

RALPH K. SHELTON, *Secretary*.

EXHIBIT 13.

Tueson to Mexico, March 12, 1899.
Nothing.

EXHIBIT 14.

Tueson to New York, June 5, 1899.
Same to Same.
Nothing.

EXHIBIT 15.

Tueson to New York, June 13, 1899.
Same to Same.
Nothing—Nielsen's putting in new crucible.

EXHIBIT 16.

636 Tueson to New York, June 22, 1899.
Same to same.

The hoist for the Niensens has just arrived, and I also bought two 500-ton copper stocks which were sold by sheriff and belonged to Seligman & Company. They were bought in by Gardner, Worthen & Goss, and I paid them \$2,000 cash for same, which is a great bargain. I shipped them right out and will set both up discarding the old jacket entirely and running one stock continuously, having the other ready for use when one needs cleaning. The Niensens should now run steady and make regular shipments.

EXHIBIT 17.

Tucson to Fabyan, N. H., July 6, 1899.

Same to Same.

The Nielsens are running right along. The hoist arrived but there are two pieces short. The mine they claim is looking very well and no trouble in keeping furnace running steady on ore.

EXHIBITS 18 AND 19.

In connection with deposition of Percy Williams.

EXHIBIT 20.

Tucson to Fabyan, N. H., July 14, 1899.

Same to Same.

637 I have received 35,000 shares of stock Ray Copper Company and \$174,335 in cash which I have credited to the proper account, and have charged myself with these sums. I did this for the reason that there is a difference between us in this mining transaction, which I am ready and anxious to have settled definitely for once and all time, and until this is settled, I have charged myself and retained the full amount.

EXHIBIT 21.

San Francisco to Fabyan, N. H., July 14, 1899.

Same to Same.

The adjoining property was sold to Old Boot and may mean a lawsuit, but I believe we can prove our relocation will hold besides our lower works prove that the ore body does not run into their ground, but does go into the English people's property, and I am working to acquire this property.

Have sent them cable offers and am in correspondence with them through Tenney & Hereford, and I believe I will secure them. My offer is \$5,000 cash or \$15,000 one year working bond and pay Hereford 20 per cent commission. I had all the ground surveyed and now own twelve claims in all. This gives every evidence of going to be a very large property. The ore body on 180 feet
638 is over forty feet wide and with another 100 feet in depth, if it holds out, can keep both smelters running steady.

EXHIBIT 22.

San Francisco to Fabyan, N. H., Aug. 23, 1899.

Same to Same.

I have been writing and cabling London owners of the Silver Bell properties, and it looks very much now as if we shall get hold

of these properties. They are sending a man over to dispose of same. I would give us a magnificent group, which I believe could easily be *a magnificent group, which I believe could easily be* placed in position for a sale at a good price.

EXHIBIT 23.

San Francisco to Fabyan, N. H., Aug. 31, 1899.

Same to Same.

(Referring to Ray) I have thought over the matter of various stockholders and bondholders of the old company very carefully, and cannot see why I personally should be held in any way for any part thereof. People buy stocks and bonds daily, and when they go into buying mining shares, they know it is a gamble and if they lose they have no right to kick. We have acted in good faith for years and years. We have kept up the property always hoping a sale could be effected to reimburse in part, if not as a whole, the stockholders at an enormous annual expense, and no one pretended to contribute to maintain the same. When finally legal proceedings were brought to reimburse our advances and property was finally closed out to make good these advances. No stockholder could have a legal or moral claim.

Regarding Rosenthal—you had a settlement with him and gave him the firm note which was part of the disputed account and is now settled. Mr. R. had no legal or moral claim that I can see.

He needs to ask no favors or charity, and while I regret that he or any other stockholder should have lost any money on this transaction, I cannot see why I should repay any portion of such losses. While I appreciate the confidence he has had in our firm by extending them credit, such confidence has never been misplaced, he never could have lost money on us. We have been very large customers of his when he was in business and have paid him big rates of interest on any moneys loaned so at any time. If you personally feel like giving him or anyone else any part of this sale, either in money or stock, that is entirely a matter of your own concern, but you must not ask me to contribute to same, for it is neither just nor fair.

Have not heard anything from English people but suppose their man is on the road.

640 We own twelve mines now in the group of Old Boot, which takes in all valuable ground showing any sign of mineral. I hope that now that the rains are over, the smelter will run steady.

Curtis writes Nielsen goes off on periodical sprees and I am afraid we will have to make a change there if this is not stopped.

EXHIBIT 24.

Tueson to New York, Oct. 5, 1899.

Same to Same.

I am very much disappointed with the result of the Nielsen property. Since my departure they have increased their indebtedness to

about \$70,000, which is enormous, and I sent for Nielsen to find out condition of affairs, and in the meantime Curtis also came in. It seems they have been running on very low grade of ore from old dumps going about 3 and a half per cent, and then only a part of the time, and that only a few days ago they made a connection with the new hoist and now they are in fine ore and ought to make money. I will watch the thing close. He is to make me weekly reports of workings and directions and if he don't make a good showing now he will get out.

I met Rosenstock the day I left San Francisco and he brought up the old Ray matter. I explained to him that there had been a difference between you and I on certain claims and charges in this matter which had been pending for many years but that all of this is now settled; that the note which was given him as a part of a joint account was one of these items, and as same was paid, I considered myself absolved from any further obligation in connection with this affair and that I did not consider there existed any moral obligations on my part to pay him anything further, nor on your part, but that this rested entirely with you, and that the matter would receive proper attention from you if you thought otherwise. Of course, you can do in this matter as you think best, but if you take my advice, don't you do anything—at least not for the present. We are liable and probably will have litigation with the bondholders, and possibly stockholders, though I am perfectly satisfied they can accomplish nothing.

EXHIBIT 25.

Tueson to New York, Oct. 20, 1899.

Same to same.

Curtis is now at Nielsen's permanently, and I hope for better results. I relieved Nielsen there, but consider it best to give them another chance, and see what can be done this month. I know the

ore is in there, both in quantity and value, but why such delay and great expense and increase in debt as great I don't fully understand yet.

I sent Uncle William his \$2,500 due on mine, as he probably needs it on account of Hilda's wedding first of November next. We can hardly afford not to pay same now, but before another payment is due, the property must make an entirely different showing financially speaking.

EXHIBIT 26.

Tueson to New York, Oct. 31, 1899.

Same to Same.

Nielsen's smelters have been shut down nearly a month, but expect to start in a few days and run on high grade ore from bottom of mine. They will run two furnaces, probably making considerable more bullion than matte in one. I am very anxious to see them start again reduced and finally paid. I certainly expected it to be fully paid out of this concern by this time, and it was a very

great disappointment to me when I returned to find condition of this account.

EXHIBIT 27.

NOVEMBER 13.

Mr. Louis Zeckendorf, New York.

643 DEAR UNCLE: Yours of the 13th ult. to hand. I was in hopes that the Azurite Company would be in better shape now to some extent, but as usual they have had drawbacks. It is a very hard thing to keep a mining company down to a limit, for the reason that they generally run from one month to another and one month means a great deal of money. I believe we will get out all right of Azurite. The old superintendent, Morgan, says he will take it at a reasonable price and our lien is on everything they have. The Nielsens are now running regular, producing 910,000 pounds per day with one furnace. They have sufficient power and blower to run two furnaces, though they claim to have ore enough to do so. The property has been badly managed or we would never be in that amount of money. Just as soon as we get in little better shape there, a chance with Nielsen will be necessary. I have been in hopes to buy out the English company for a nominal sum and then place the property for a big price. The property is good and will bring a good price, but I am so much disgusted with the affair that I am willing to sell at once. I believe the property will bring \$150,000 and if you have a buyer send him out to examine same. The Ray Company buy largely direct. They imagine they can buy cheaper than we can sell them, and in many instances this is true. We do considerable business with them, but not what we ought to do. In time I am in hopes to controlling the bulk
644 of the business. Alfred is doing a very large business here now and both at mine and new works. Naturally with building the railroad and construction work in general, a great many more men are employed than would be ordinarily. The question of store concession has not yet been decided by them and while it lasts a good business should be done. The company are somewhat behind with us and I have been urging more prompt payments and hope in a few days to get a check in full. The tremendous amount of goods and freight bills to pay make us very short here. Our freight to Southern Pacific Company last month was nearly \$18,000 and this month has been equally heavy. I am in hopes of making you some remittances in a few days and with the steady shipments from Nielsens soon to reduce our account and I hope we may not have occasion to get in such a box again. Collections have not been what they ought to be and I am keeping after our matters personally now and hope to have same in better shape soon.

I regret that you got involved in coffee shipments, would gladly help you out here if we could use that grade of stock. You can readily see that such heavy withdrawals from the business are bound to hurt us and more than the business can stand.

How is Artie doing and where is he now. I am afraid we will

645 have to get another bookkeeper. Meyers has no trial balance out and don't seem to be able to keep up the work. I like him very much, but this is too important to neglect. The work in office has been great and with Adolph sick for some time ran them behind. A letter from Denver received from Aunt Fanny a few days ago, advises us of Rosalie's sickness, which does not seem to improve as they have taken her to Cincinnati to consult Dr. Raushoff. Leopold has gone along. She left all the children with Aunt Fanny, who has now more than her hands full. It seems they have no end of troubles. Leopold will return, but Rosalie will probably go to New York for some time until she is fully cured. I expect Dr. Gordon here within next week. Hope then to have a final settlement of balance I claim due on Roy, regarding which I have already written you.

With much love from all to all,

Your Affectionate Nephew,

ALBERT.

EXHIBIT 28.

Tueson to New York, Nov. 28, 1899.

Same to Same.

The mine looks well. They have sufficient ore yet to run two smelters which will be the only way any large surplus can be assured. They are now clearing about \$500 per day. Still, I 646 am in favor of selling. Judge Barnes has same under consideration at \$200,000 gross or \$150,000 net cash.

EXHIBIT 29.

DECEMBER 15TH.

Mr. Louis Zeckendorf, New York.

DEAR UNCLE: Yours of the 21st inst. to hand. I regret to learn that you are not feeling well again, but hope you have fully recovered ere this. I am leaving today for Nielsens and will see how things look on the ground. Curtis is out there also and I sent another smelting man out to investigate certain losses in bullion in smelting. I will send you a trial balance of just how the concern stands when I return. The reports from the mine itself are very good. Barnes has a party coming out to examine same at \$150,000 cash and I hope they will take it. Whatever changes are to be made out there I will decide when I get there. The Azurite is closed down. A Mr. Christy of Phenix, has assumed the payment of all the debts and I have no doubt now that we will get our money. It is a very hard thing to avoid getting involved with a mining company when you once get started with them. I hope though 647 we will get out all right in the end. I sent you the — and hope you will understand everything. Mrs. H. E. Huntington went out at Roy with a few.

EXHIBIT 30.

DECEMBER 21ST.

Mr. Louis Zeckendorf, New York, N. Y.

DEAR UNCLE: Yours of the 12th inst. to hand. I returned from Nielsens yesterday and found everything looking very encouraging, so far as the mine is concerned. The bottom of mine 220, where a level is now being run, shows a very strong body of high grade sulphides which looks like very extensive and as if it will go down. After the extent of same is opened sinking will be continued, all with a view of blocking out ground, with an ultimate view of selling the property. I believe the property could well command \$200,000 to \$250,000 cash and if we would only secure the English properties joining us, we could soon open up a very large property. I am still working to secure the same, and believe eventually will succeed, but I should have gone to London last summer and finished the same there. I may conclude to shut down the mine and smelter—the latter anyway, in order to make more progress in developing with the hope it may bring about a sale to us of
648 the English adjoining properties and further dispose of the Nielsen people, which will, in any event, be necessary. I find the Nielsens have managed very poorly and involved the concern largely in debt for which there was no good reason. Were we out of debt I should have shut down at once and insisted on them getting out, but this will be necessary anyway at an early day, unless we sell.

I enclose you herewith first balance and statements of the concern to first inst. The values placed on the various assets is nominal and what it would realize is packed away. The mine is charged only with the three installments of \$2,500 each. The other mines with the amount expended on them. There is none of them shows much value but may develop or be valuable on account of their proximity to the property. The furnace operation shows the result to the 15th inst., showing a net profit of about \$400 per day and ought to do better now from the higher grade ore they have. Coke is on hand to run to about the 15th or 20th prox. and if we shut down then I estimate that there will be a deficit of about \$28,000. I gave an option on the Omega group for sixty days for \$30,000 cash, out of which have to pay E. L. Vail 10 per cent and the chances are favorable that the same will be accepted. Now is the
649 time to sell all mining properties and no opportunity should be lost to place same. In the Azurite claims I believe now we will get our money very soon, and I shall be glad to get out of same.

Please return the statement of Globe Minerals Company I sent you. I want to keep all these papers together. It is hard, of course, to be separated from Artie, but if he is doing well, you should be contented. I notice the great flurry in money matters, but hope same may soon subside. The English are being whipped by the Boers.

Article 31.

DECEMBER 31, 1899.

Mr. Louis Zeckendorf, New York.

DEAR UNCLE: Yours of the 22d inst. to hand. Reg. Azurite I believe we will in time get our money. Christy has paid all the liens and claims but ours and has to pay us to protect himself. It is not always practicable to follow out the safe plan of making advances only on collateral sufficient to cover and with the greatest of care you are liable to slip up. The experts for Judge Barnes party went out to examine the Old Boot and have not yet returned. I don't know whether anything will come of same. Will know result in a few days. If copper holds up reasonably well, all these claims and mines ought to sell. I believe there is a large ore body there and in adjacent claims and I wish we could get control of same. I wrote Uncle William it was no use him trying to do anything with Matas, unless he will put up something.

If he comes out here thinking he can do otherwise, he will be mistaken. We had letters from Denver and Rosalie is back again feeling somewhat better but will probably have to have another operation performed later on. She has had her share.

EXHIBIT 32.

Exhibit 35 in Franklin case and is letter dated January 3, 1900, Steinfeld to Nielsen—in view of large indebtedness and fact that little headway is being made, I have decided to close down on the 15th or 20th inst.

EXHIBIT 33.

JANUARY 9TH, 1900.

Mr. Louis Zeckendorf.

DEAR UNCLE: I am very sorry to learn from yours of the 3rd inst. that you are so seriously ill from the effects of a cold, having affected your bladder, and I sincerely trust that no serious consequences may result. I also have your telegram that you are moving to hospital for operation, which looks to me the difficulty requires prompt attention and that same may terminate successfully and soon again restore you to perfect health is my earnest desire. I can imagine how anxious and worried Aunt Tillie and all your dear ones must be during this trying time. I wish I could be with you. I feel however, that in the skilled hands that you are, nothing will be left undone to bring you about in good health again and in short order. Hope and courage are great factors in helping nature to perform its functions in the human system. Believe in both, therefore, dear uncle, and we will soon have you bright and chipper amongst us.

I will not bother you about my business matters at present, except to say that I have concluded to close down the Nielsen Company, as I find it is absolutely necessary to acquire the English claims

before proceeding, as also to get rid of the Nielsens. I had a telegram from Uncle William about the payment of his installment due of the 10th inst. with thirty days' extension, regarding which I was going to write you fully, but I will postpone same until I hear you are fully recovered. Everything else is moving along as usual. Mr. Fink left a few days ago to attend the spring purchases and I hope he will do well. He has been in very poor health and the change may do him some good and the change in buying may also be beneficial.

652 With much love to all your dear ones and hoping for a full and speedy recovery from your sickness, I am
Your Affectionate Nephew, ALBERT.

EXHIBIT 34.

MARCH 25, 1900.

Case in the near future. You may give me your own views on subject. There is one thing you are in error in, I believe. I do not think these people can afford to foreclose these bonds and that they will not do so.

Nielsens. We are now shut down there over two months, not on account of lack of ore, or prospect in mine, for this looks better than ever and bids fair to open into a very large property. Unfortunately the ore body drifted direct into the English claims and when we stopped we were within 20 feet of the end line of our claim. The securing of these claims became therefore imperative and a shut down was necessary to accomplish this. It further became necessary to get the Nielsens out on account of their not being able to harmonize with the best results of the works. The only bad feature about this is that the concern is heavily in debt to us. I can't tell

653 just the amount, but it will be over \$30,000, exclusive of what is owing Uncle William, which is \$15,000. There is ample on hand and in sight to make good all claims against the property and if we can secure these claims, the property would undoubtedly sell for a large sum of money. I am in a fair way to bring this about but should I fail in this respect, or to sell the same to a party Judge Barnes is connected with and who have already examined the property and are to pay \$150,000 for same, then I shall start the property up again and make good the advances we are in. I can now see it was a mistake any way to close down before we were reimbursed but it cannot well be helped now. This is, of course, a great disappointment and really to my mind not necessary except through very bad management. We will, however, come out all right in the end. Of this I feel assured and we have to make the best we can out of it. What I want Uncle William to do is to forego for the time being his quarterly payments of \$2,500 which I think he certainly ought to do, in view of the predicament this places us in. You can readily see that we must acquire this property and that this will happen is a foregone conclusion. He is perfectly safe and will get every dollar of his money in time, and I hope you can arrange this satisfactorily. I wrote him on this sub-

ject partially only and said that you would in time explain the matter further. I furthermore want the right to terminate this contract with Nielsen M. & G. E. and take it up under name of
 654 another company should we so desire. We have got to get rid of Nielsen under all circumstances for many reasons that I will explain hereafter. Should we succeed in getting these English properties we have something we can sell for a big price and will stand investigations. You need have no fear of eventually getting our money out of same. There is ample in sight to do this, however, we should make an effort to get more than this which I believe can be secured.

Inventory, in a few days I hope to have inventory completed and will mail you statements covering same. As near as I can figure now, after having made liberal deductions including P. & L. accounts of long standing, we will show a net of about 75-80,000, which, considering everything, is not bad. I would like to see you come out this spring and possibly this mild weather would do you good. You could personally understand many things better than I could explain them by writing. Since starting this letter I had quite a talk with Hill about hay. He still is very confident of the success of the property and in that his final estimates of results will be accomplished. I would, however, like to sell at least one-half of the shares if possible, as that is enough to gamble on. I will await your advices on this. They are still working the Mowry, the showing so far, however, has not shown up very satisfactorily.

655 I shipped the tombstone for poor Aunt Julia's grave and sent you the bill. It turned out very well. From Denver we hear that Rosalie is still complaining and will probably have to have another operation.

EXHIBIT 35.

APRIL 20th, 1900.

Mr. Louis Zeckendorf, New York.

DEAR UNCLE: Yours of the 6th inst. I answered in part a few days ago. I am much pleased to know that you are now getting around again, and I have no doubt that you will soon be yourself again. It takes sometime to get over a sickness of this kind and you can feel thankful that you withstood same so well.

Regarding Azurite a trade is again on hand, which I believe will go through, by which we will get our money in a few days. Mr. Taylor, the associate of Mr. Hill, examined the property for his company some time ago. This report was favorable. If they could get same on favorable terms, the Globe Min. Exp. Co. would take same up. This, however, would mean a long winded affair. I figure in any event we are perfectly safe for the amount they owe and I do not doubt that we will get out of same in short time satisfactorily.

Reg. Ray shares, you may be right. This is undoubtedly
 656 a very large property and ought to be a very profitable one.

I am not satisfied with their arrangement, however, and recognize the absolute necessity of a railroad to successfully work the property. This undoubtedly will come in time. Mr. Hill, who

recently interviewed C. P. Huntington assures me that the railroad will come within a year. Mr. Dexter returned to London. While in New York he sold considerable of the Ray debentures there and especially a large block to Thompsons, who run the Ref. works, who offered to take all the issue which they, however, won't sell to anyone now. Mr. Hill tells me all this. I have begun on a trade with Hill for the Silver Bell properties which will be a happy solution of this whole matter if it goes through. I am expecting him any day to finally close same up. The terms are these: He is to purchase the English properties on which he now has an option for the London parties. He is to settle the several complications of title to same by suit, to secure an option from the Red Rock and other groups and an assignment from Nielsen of his contract with these companies and their interest in same; to do three months' development work on Old Boot, at end of which time he is to start the smelter. He obligates himself to pay \$17,500, being past due and to become within eighteen months in all as follows: \$17,500 as stated and then \$50,000 from the net proceeds smelter, deducting
657 only the cost of smelting and extending the ore all products to be turned over to us; after having paid \$50,000, he is to repay any development work paid out on property and after that all proceeds again are turned over to us. Any outside ores he may smelt by paying reasonable smelt charges. In event he does not pay or operate continuously he loses all and any properties he acquires by purchase or otherwise reverts to us. In addition we get 10 per cent. of the net profits of any sale that may be made hereafter. If he signs such a contract we are perfectly safe to get all the products of the property to at least \$67,500.00 and any property he acquires is for our benefit. I expect him in any day and the matter may then be closed up. I will send you a copy of contract as soon as made. I hope the matter may be closed up for I believe we will get out in good shape. Hill has given up the Mowry and I am trying to get others interested in same. I was over to Gunterville about a month ago, where we were doing some work on Record Excelsior, which is showing up very fine. We have enough ore on dump to pay for this work and I am in hopes that we can now either interest the Rosemont company or Helvetia company in its purchase. This same applies to the Omega. They have made a very good strike in the Mohawk which joins the Omega and there is no reason to
658 doubt but that the same exists in Omega. I went over the claims and was quite favorably impressed, and I believe we will eventually sell same for a good price. An expert went out to examine the Montana mines for the El Paso S. Company. I made him no price yet; they want it on a royalty to ship ore from if it will stand transportation. I don't know if anything will come of it. The Sisson crowd are working in Silver Bell, sinking and leveling this property. If Hill takes up our property it will make a stir there. I hope you have arranged the matter with Uncle William about this payment. I wanted him to apply same for his share of Thomas land of which I claim he owns one half. The amount this property stands in for now, with int. is about \$16,000. I wish

we could get out of it. I offered to turn over everything if he will pay the * * *

EXHIBIT 36.

TUCSON, A. T., *May 2nd, 1900.*

DEAR UNCLE: Mr. Hill left yesterday for New York and will call on you and take some Ray bonds. I refused to take any myself and have explained reasons. Today I received a cable from them, that in order to float bonds, they must give an option on a portion of their shares at 15s. for 18 mos.

I answered that I could join them on my shares on basis as 15,000 is to 26,000, if conditions are satisfactory. This 659 shows our good will and disposition and in event same is accepted, we will * * * If they approach you on same subject, you can with perfect propriety refuse. They will have to put this through anyway. I will write you again tomorrow or next day Am very busy My deal with Hill on Silver Bell fell through but am on another With love,

ALBERT.

EXHIBIT 37.

Tucson to New York, May 4, 1900.

Same to Same.

The pending deal I had with Hill fell through but I am negotiating with another on better terms, as the Hill deal was entirely dependent on whether he could make it out of the property.

EXHIBIT 38.

Tucson to New York, June 10, 1900.

Same to Same.

I received your telegram about examination and sale of Old Boot. I agree with you that we should not have got involved in this enterprise, and there is no reason nor necessity for doing so but we are in it now and we will get out of it all right. I think you may rest assured. I am in hope that by the end of this year we will be in much better condition.

660

EXHIBIT 39.

Tucson to New York, June 16th, 1900.

Same to Same.

I have already written you condition of Old Boot. I am going out there in a few days and will then decide just what is to be done.

EXHIBIT 40.

Tucson to New York, June 29, 1900.

Same to Same.

I have been out to the Old Boot and looked over the mine generally and concluded to send out a surveyor at once to survey the underground works and show us just where we are and how to locate our ore bodies. After ascertaining this information we will at once start development work and I believe in sixty days we can be ready to start the furnaces again, and I hope make us even on all advances on the property, and, in the meantime, if there is a favorable chance to sell to do so, I have promised Judge Barnes' people, who have already examined the property when it was in operation the first chance of a sale.

I have about concluded to make a trip to London and the Continent about the middle of August. I want to try to do something with Ray shares while I am there, and possibly make some
661 good connections with some of our other properties. I do not think it will take me much longer than my usual vacation, and I think I will like the change, and especially dear Bettina, who will enjoy the exposition.

EXHIBIT 41.

Deed Nielsen and Lewis to Steinfeld, dated June 29, 1900.

EXHIBIT 42.

Stock certificate No. 2 of the Nielsen Mining and Smelting Company and endorsements on back, being for 300 shares of stock.

EXHIBIT 43.

Agreement for transfer of stock.

Agreement.

Carl S. Nielsen and Mary, his wife, consideration \$1 sells to Albert Steinfeld all our right, title and interest in and to the 300 shares of the capital stock of the Nielsen M. & S. Co. now standing in the name of Carl S. Nielsen; also our right, title and interest and claim of any kind in and to the property and effects of the said Nielsen M. & S. Co.

EXHIBIT 44.

662 Agreement June 29, 1900, between Steinfeld and the Nielsen M. & S. Co. of first part and Carl and Mary Nielsen of second part.

EXHIBIT 45.

Tucson to Fabyan, July 7, 1900.

Same to Same.

Judge Barnes is expecting someone out who will negotiate for option on Old Boot. I hope to get away from here about the 20th of August, leaving for San Francisco, and arrange to go on my European trip about the 15th or 20th. I hope that nothing will interfere with same, as I look forward to same with great pleasure.

EXHIBIT 46.

Letter dated January 13, 1902, to Globe Mineral Exploration Company, London, signed by Albert Steinfeld, in which Steinfeld says: I now enclose you herewith statement showing the exact condition of the account after making deductions for shortages, discrepancies and disbursements made showing a net balance of \$1887.49 which amount I am willing to pay on demand, provided you withdraw your claim for balance due on Tucson smelter and I will withdraw my claim for damages which I claim is well founded. For this purpose

663 I enclose release of my claim for damages, as also release for your claim on the Tucson smelter, and upon your advice either by letter or cable, that you have executed this paper and approved of the account as submitted, I will pay the amount as you may direct. I trust that the matter can be terminated without further delay.

EXHIBIT 47.

Deed Volkert & Klug to Mammoth Copper Company, dated June 4, 1900.

EXHIBIT 48.

Agreement between Albert Steinfeld and Margaret Francis and Julius Volkert, being Exhibit 3 in the Franklin suit. This agreement printed in full with Exhibit 137.

EXHIBIT 49.

Deed from Volkert to Mammoth Copper Company, dated May 17, 1900.

EXHIBIT 50.

Deed from Franklin and Volkert dated May 17, 1900 to Mammoth Copper Company.

EXHIBIT 51.

Letter Steinfeld to Alex. Hill, March 15, 1900 nothing material.

EXHIBIT 52.

664 Letter March 10, 1900, Steinfeld to Hill, referring to our conversation regarding Silver Bell properties it occurs to me that it would be wise for you to cable your people to procure from the English representatives a written option or bond on the properties in question.

EXHIBIT 53.

Telegrams—Florence, via Casa Grande. Express Office Casa Grande.

All communications should be addressed to the manager.

Ray Copper Mines, Limited.

RIVERSIDE, PIMA CO.,

ARIZONA, *March 13, 1900.*

Albert Steinfeld, Esq., Tucson, A. T.

DEAR MR. STEINFELD: I am in receipt of your favor of the 10th inst. regarding the Silver Bell properties. As you are aware, I was asked to look into these properties on account of the Globe Minerals Exploration Company and the receiver in London will expect the company to advise him whether they will take the properties up or not. Under these circumstances, as I thought I had indicated
665 to you when I saw you the other day in Tucson, it would hardly do for me to make, for a third party, a distinct offer to purchase under any conditions whatever, at the present time. All I can do is to advise my directors that I do not think this is a business it would suit the Globe Minerals Exploration Company to take up, and this I intend to do, but I hardly care to negotiate an offer on my own behalf or on yours for these properties.

I would advise you to write direct to the receiver, whose address you have. I have no doubt that if you make a distinct offer and give guarantees to the receiver that the money will be on hand in a short time, you will receive an answer one way or the other with but little delay.

I trust that you will understand that all I can possibly do to assist you in such matters as this, I shall be most willing to do, but it places me in a somewhat awkward position seeing that I would turn the property down for the Globe Minerals Exploration Company and then immediately turn around and make an offer in my own name for the property. I do not care that my actions should cause any suspicions on the part of my employers, and such a procedure as this might at any rate lead to some uncomfortableness.

I have been asked by a broker in Newcastle-on-Tyne if
666 there are any fully paid Ray shares for sale in this part of the country as some clients of his desire to purchase these a little below par. If you or any of your friends who hold fully paid Ray shares are desirous of selling, I should be glad to put you in

communication with this broker. I believe he is anxious to buy a block of about five thousand shares.

Kindly let me have an answer to this at your earliest convenience.

Yours faithfully,

ALEX. HILL.

EXHIBIT 54.

Report upon the mine, being Exhibit 37, in Franklin case, dated March 24, 1901.

Replying to your request for a description of the Silver Bell Copper Company's property, I respectfully report:

(Then follows report upon Old Boot claims and English claims. Addressed to Albert Steinfeld; signed by Curtis.

EXHIBIT 55.

Tucson to Fabyan, July 18, 1900.

Same to Same.

667 The only serious mistake he (meaning Hugo) made last fall was in allowing the Old Boot and Azurite to get too deep into us. I am now waiting to meet the parties who are expected here next Sunday to negotiate for the Old Boot. My price to them is \$150,000, ten per cent. cash and balance in two, four, eight and twelve months.

EXHIBIT 56.

Tucson to Fabyan, July 25th, 1900.

Same to Same.

The parties who were to negotiate for the Old Boot came but I cannot come to any agreement as they wanted to tie same up without paying anything down. I told them whenever they are prepared to go into any reasonable contract and pay down 10 per cent of purchase price, we may sell, but do not hold the price open. I am in hopes that within sixty days we can start furnaces and repay ourselves for all advances.

EXHIBIT 57.

Tucson to New York, Dec. 9, 1900.

Same to Same.

I am going out to Red Rock for a few days and will arrange to start same up and produce at earliest possible moment. They have spent considerable money in development since last summer and according to reports same is showing up very good. I want to realize first our advances out of same, which I think ought not to be 668 difficult and at the same time have an independent report made on same so that we may know just what we have and then invite capital to buy same on some satisfactory basis.

EXHIBIT 58.

Tucson, to New York, Dec. 19, 1900.

Same to Same.

I shall go out to the Silver Bell in the morning and try to arrive at some plan of action to start smelters and realize our advances I hope. The reports from there continue favorable and I hope we may soon be out of the same with our advances.

EXHIBIT 59.

Stock Book.

EXHIBIT 60.

San Francisco to Fabyan, Aug. 2, 1901.

Same to Same.

The reports from the mine are very encouraging. I only regret the smelter has been closed down so much.

EXHIBIT 61.

San Francisco to Fabyan, Aug. 15, 1901.

Same to Same.

569 Yours of the 9th inst. with copy option Silver Bell to hand.

I am satisfied nothing will come of this option. Reports from mine are very good. I hope they have started smelter by this time.

EXHIBIT 62.

San Francisco to Fabyan, Aug. 25, 1901.

Same to Same.

In matter of Nielsen stock which I purchased under the contract, I think that in view of Uncle William having refused to assist us in carrying the obligations of the property and that he has merely enforced his contract that he should not participate in same.

EXHIBIT 63.

Tucson to New York, Sept. 25, 1901.

Same to Same.

There is no question of the existence of a large ore producing mine, and it has got beyond all stages of a prospect. The indebtedness has grown very much since last spring, but now the smelter has resumed with large ore reserve on dumps and I am in hopes it will soon be materially reduced. The property is for sale to the first legitimate buyer.

EXHIBIT 64.

Tueson to New York, Oct. 6, 1901.

670 Same to Same.

My final offer to Davis people was \$50,000 cash—\$100,000 sixty days and \$150,000 in six, twelve and eighteen months with interest at 6 per cent. They have made a wonderful furnace run for September—nine cars of matte. The mine is kept in condition to show and sell. There probably is a big mine there, but we cannot chance any more than we have, which has exceeded anything that I ever contemplated by a great deal and I am much worried over same. On September 1 they owed us about \$90,000. The production in September will probably go \$40,000 and Curtis claims on hand at dumps ores that will net to us \$30,000 to \$35,000. We must sell and get out of this.

EXHIBIT 65.

Tueson to New York, Oct. 17, 1901.

Same to Same.

The mine is holding out very well and Curtis reports good progress. They are making a phenomenal furnace run and everything seems to be working smoothly. Just received your telegram that M. declined to send expert to examine without knowing amount of ore in sight. It is absolutely impossible to estimate the tonnage in sight. It must be seen to be understood and appreciated. It is rather a late hour to ask this question now.

671

EXHIBIT 66.

Tueson to New York, Oct. 23, 1901.

Same to Same.

I wired you today that Curtis estimates conservative 50,000 tons ore in sight valued at net \$875,000. The smelter has made a phenomenal run and should show a good profit, but we must sell by all means. If you are unsuccessful in selling outright my idea is to increase the corporation to say 100,000 shares par value \$10 each and sell 30,000 shares at \$5, which I think can be done, and will be a good investment of this kind to anyone with great prospective increase in value. This would pay all debts and give sufficient for necessary improvements on developments on development work.

EXHIBIT 67.

NOVEMBER 6, 1901.

Same to Same.

Our recent developments in the adjoining claims make it necessary as already written you, to withdraw all prices for the present.

EXHIBIT 68.

Tucson to New York, Nov. 10, 1901.

Same to Same.

672 Do not make any price on the property to anyone. We will soon know what this new find will amount to and until we do we do not want to be compromised. I am urging Curtis to start his second furnace and to push the new find and see what it amounts to. I am very anxious about the property, but it is too much of a load to carry.

EXHIBIT 69.

NOVEMBER 3, 1901.

Same to Same.

I met Mr. Lesynski here about Silver Bell but I don't believe there is any more in him than the best of promoters who claim to have buyers ready to pay cash and buy property. He wanted thirty days time and that if Matheson would not buy, he had someone else. I told him that I would not give thirty minutes time except to satisfactory principles who would obligate themselves to carry out a specific contract. He will see you in a few days. The smelter has been shut down since the 20th on account of coke and Curtis just returned from El Paso, where, after a hard struggle, we got coke to start again and hope will run without a break now. The Davis people arrive at Red Rock today and I am very anxious to know what they have to say. It seems this is a new combination. Owing to new finds recently made on Imperial, which they say is opening up very good, showing a large blowout of carbonate ores, 673 which we need so much in smelting, I have withdrawn price on property for time being until we see what this amounts to. We want to sell by all means if possible, but want to get all we can. I am still of belief the plan of selling part stock is possible and the only thing to do, if a sale can't be made. It will not be necessary to go to your friends to take stock but this can be done through brokers, who have satisfied themselves of the extent and value of the property. The Old Boot has got beyond the doubt of a prospect, is now a mine of permanent value, which depends only of ascertain the extent and value thereof. In meantime, until I again advise you, we withdraw all prices on property.

I enclose you herewith in duplicate an attachment to our articles of co-partnership of date August 7th, 1899, to settle more clearly the clause with reference to mines, mining stock and bonds. Please sign and return me one signed. I will be glad to meet Mr. Williams and interest him in some of our property. Lyman Bridges don't amount to much and I wouldn't pay much attention to him. We are liable to have a railroad from Phoenix to Benson which we are trying to divert via Tucson and with success, I believe, if it will be built, which is probable. I am advertising the Thomas land for

sale and if Uncle William wants to acquire this he had better act before it is gone. I am very sorry we had to miss the good opportunity we had.

EXHIBIT 70.

Tucson to New York, Nov. 23, 1901.

Same to Same.

While the property is looking very well it will require an expenditure of a very large sum of money making it produce and show its best results and under the circumstances we should sell if possible. I also enclose statement of balance of Silver Bell Copper Company to date after deducting for ores shipped and for which no returns have yet been made. I think it safe to estimate that this can be reduced at rate of \$10,000 per month with the one furnace and more than double that with both furnaces going. It is safe to figure that by first of January both furnaces will be running.

EXHIBIT 71.

Tucson to New York, Dec. 16, 1901.

Same to Same.

The reports from property continue very good, but, of course, we are working under great disadvantages in the cost of producing copper, and I am very anxious we should get buyer at very earliest day possible. It will take a great deal of money so if we can get outside capital to take up part of our stock, somewhat on plan of Greene, it would probably be a good thing for us, but I do not think such a thing is to be thought of in the present condition of the stock market. I am urging Curtis to start the second furnace at earliest day possible.

EXHIBIT 72.

Same to Same.

DECEMBER 31, 1901.

I have been out to Silver Bell for the past few days and am somewhat alarmed at condition of copper market, and only hope that this is only temporary. I have concluded to run until coke, wood and supplies are exhausted, which will be about four to six weeks. I figure at 12½ cents market we can make a stand-off and if there is any chance of a better market by holding, to hold same until such time. This sudden change in the market is a great disappointment. With our present plant we cannot compete and make any money and it is best to close down and await results. I thought we might just as well convert our coke and supplies into convertible money. If you think we ought to close down at once, however, wire me and I will do so. By selling on today's market we get

nothing on our ore except cost of mining same. The mine
676 itself is looking well from all reports I can get. Still, I was
disappointed and expected to see more accomplished. It is
very necessary that we keep fully posted on just what is going on.
I guess this market will close down all the small copper producers
here. I am very anxious to get rid of this property, as it is a very
great strain on me and we cannot afford to carry same.

EXHIBIT 73.

Tucson to New York, February 21, 1902.

Same to Same.

We are on a deal with N. O. Murphy for Silver Bell. I hope
something may come of it. Price \$600,000.

EXHIBIT 74.

Same to Same.

MAY 23, 1903.

Mr. Johnson, representing some Chicago people, is making
thorough examination of Silver Bell. I hope something may come
of it.

EXHIBIT 75.

Tucson to New York, May 30, 1902.

Same to Same.

Mr. Johnson returned from Silver Bell much pleased, but
677 unwilling to submit same at exceeding \$375,000. I have
given him permission to submit same on this basis. Have
given him until the 15th of June. I only hope they make take it.
There is too much risk about a property of this kind.

EXHIBIT 76.

Same to Same.

JUNE 13, 1902.

Regarding the shares of Silver Bell I don't know either of us
are entitled to same at present. They are an asset of the firm until
same is paid when they will be distributed in accordance with our
contract.

EXHIBIT 77.

Same to Same.

JULY 3, 1902.

I have heard nothing from Johnson. The property looks fine
just now and is open for the purpose of sale. We want to take no
chance of having it spoiled.

EXHIBIT 78.

Johnson's report May 17 to 24, 1902. Describes the entire group as property of Silver Bell Company.

EXHIBIT 79.

Report of Curtis dated February 15, 1902 to same effect.

678

EXHIBIT 80.

Prout's report, April 10th, 1902.

EXHIBIT 81.

Tueson to New York, July 12, 1902.
Same to Same.

I expect party here next Tuesday. Am also in touch with big Scotch syndicate; am in hopes something may come from Johnson people.

EXHIBIT 82.

San Francisco to Fabyan, Aug. 6, 1902.
Same to Same.

Made an offer to Holiday of London, \$500,000, \$250,000 cash and in addition 20 per cent of the stock of the corporation that will buy.

EXHIBIT 83.

Same to Same.

SEPTEMBER 1, 1902.

I have met several men with respect to Silver Bell. Johnson thinks he can sell Silver Bell property yet, and I hope so. I have made Johnson a price of \$500,000 less 10 per cent. on a practically cash basis. I shall leave here for New York end of this week.

679

EXHIBIT 84.

Tueson to New York, Oct. 31, 1902.
Same to Same.

Curtis is on his way home and don't think he done anything about the mine. I am in hopes Johnson will be more successful.

EXHIBIT 85.

Same to Same.

NOVEMBER 5, 1902.

Johnson insists that he will sell Silver Bell yet.

EXHIBIT 86.

Tucson to New York, Nov. 15, 1902.

Same to Same.

The report you refer to I gave to Curtis. I don't know what he has done with it.

EXHIBIT 87.

Same to Same.

NOVEMBER 22, 1902.

I believe we will yet sell the Silver Bell ere long which will help us materially.

EXHIBIT 88.

Tucson to New York, March 14, 1903.

680 Same to Same.

Mr. Gage was here today. I finally agreed upon enclosed copy of letter sent him. The enclosed copy referred to letter Steinfeld to E. B. Gage, March 14, 1903.

In consideration that you will have a final examination of the Silver Bell Copper Company's mines not later than next week, I will agree to sell you the properties referred to in the report submitted within thirty days from date, for \$50,000 cash, etc.

EXHIBIT 89.

Same to Same.

APRIL 4, 1903.

I met Gage people yesterday and after a long conversation finally agreed upon enclosed copy of contract which I trust will be satisfactory to you. Out of this money we have to pay Gov. Murphy a commission of \$25,000 cash and it includes all the personal property which we finally lumped at \$2,500.00. They did not want to allow anything for same. The inventory cost of this personal property is about \$10,000.00. I think that deferred payments are perfectly secure as they get no deeds until final payment is made. We can

681 afford to take some chance with people of their standing. They are the same crowd that is operating at Congress, Jerome and a large property near Prescott. Beaton is the president and I have asked him to call on you. The price give us

practically \$490,000 net and is better than we heretofore expected to realize. I am satisfied these people will make a great success of same, and now we have to wait result and the closing up of the transaction which I do not doubt will be done. I rely largely on Mr. Gage's words and promises.

EXHIBIT 90.

Tucson to New York, May 20, 1903.
Same to Same.

I wrote you this morning that Old Boot deal was completed and we received \$115,000 in a check on Phoenix bank this day.

I also hold four notes of the Imperial Copper Company. Both the money and the notes have been turned over to me as the treasurer of the Silver Bell Copper Company, and as such I shall hold them and also as security for the fulfillment of certain personal guarantees I had to give to the purchasers as to the validity of titles, etc., and copy of all these papers I will send you tomorrow.

EXHIBIT 91.

Letter June 5, 1902. set forth in minutes.

682 Exhibits 92, 93, 94, 95, 96, 97, 98, 99, 100, 101 and 102
are all letters from Louis Zeckendorf to Albert Steinfeld set forth in the minutes.

EXHIBIT 103.

MAY 22, 1903.

Mr. Louis Zeckendorf, 320 Broadway, New York.

DEAR UNCLE: I have been very busy both yesterday and today. Could not get you the copies of agreements entered into, but herewith send you the original of the two contracts, and ask you that you return them to me; and if you could you may have copies made thereof. We received \$115,000.00 which has been distributed as follows:

Teleg. transfer, \$75,000, less 617 returned.....	\$74,383.00
Paid N. O. Murphy for his com. contract of \$25,000. .	22,500.00
Paid Amounts due Mammoth Copper Company and A. Steinfeld.....	18,117.00
	<hr/> \$115,000.00

The Murphy commission was agreed to be paid in full on first payment, but the reading of the contract was that it referred to partial payments, though the Gage people paid \$12,500 cash,
683 their portion of same. At any rate I settled same by discounting it \$2,500.00 which he agreed to and we are that

much ahead. There is still due Francis Volkert contract, \$12,500, when sale is consummated and to Mrs. Nielsen \$15,000, which closes up all the debts except what is owing to the firm. I have rendered some very valuable services for this company for which I am entitled to compensation which we will adjust later; on the whole I think we come out pretty well. I expect Franklin will have * * *

EXHIBIT 104.

Louis Zeckendorf to Albert Steinfeld.

MAY 28, 1903.

As far as your guarantee is concerned I am perfectly willing to indemnify you to the amount you are entitled to, and there will be no cause to deprive me of any dividends on account of future payments. I am surprised I see in your statement pay to yourself and Mammoth Copper Company \$18,117 cash, what does this mean? It is the first time that I ever knew there was such company, as you have never said a word about it. How do you arrive at such figures? You surely cannot deal with yourself. You mean that those prospect holes are worth that amount? On the same principle you could have taken any amount and credited the Silver Bell with anything you pleased. I cannot see how Mr. Curtis can
684 locate such mines while either employed by our firm or the Silver Bell. Such locations justly belong to the Silver Bell. I hope you can explain this matter satisfactorily to me. You cannot ignore me in such affair in which I am interested. You speak of due Francis & Volkert \$12,500. This is entirely new to me. You always said Gov. Murphy would get \$25,000 and in yours of the 4th ult. you said that you arranged that Gage people should pay off the * * * Nothing about Volkert; you also state the price gives us practically \$490,000 net and nothing said about the Mammoth Company.

You also say you are entitled to compensation for valuable services rendered. Did I ever dream of rendering a bill for untold labor I rendered in the Copper Queen, Ray, Copper King. Can you compare your services with mine. When I called on hundreds of people buy stock—I never heard of such thing that one partner wants to charge the other for labor performed.

Regarding Franklin's bill, you should have made your agreement beforehand, especially as you know him. I would like very much to pay our local indebtedness and you cannot draw on me on account of the \$75,000 as most of it is disposed of, as you know. Send me a statement due us by the Silver Bell.

EXHIBIT 105.

685

JUNE 4TH, 1903.

Mr. Louis Zeckendorf, New York.

DEAR UNCLE: Both yours of the 20th and 28th inst. at hand. I think we may well congratulate ourselves on the successful termi-

nation of the negotiations by which we got rid of the Silver Bell properties, which have been such a cumbersome and heavy burden for us to carry. I only hope that nothing may arise that will prevent the final consummation of this transaction, when we may all feel well satisfied. You evidently do not understand the nature of the various properties transferred, though I thought this was at various times explained to you. I enclose herewith a Memo. showing the record title of the 49 claims embraced in the sale. I have divided them into four groups. No. 1 is the original Mammoth, or commonly known as Old Boot, bought from Uncle William. No. 2, consisting of twenty-nine claims bought by Curtis and by him deeded to Silver Bell Copper Company. These claims cost nothing except the assessment work and are of no material value except their close proximity to the other properties. The No. 2 claims, Accident and Black Rock *was* bought by the Silver Bell Company for a few hundred dollars, one being required as an iron mine and the other was the Elliott claim relocated. The No. 3 group consisting of one and three total 17 claims, were acquired by the Mammoth Copper Company, a company organized and controlled by me, and was for the purpose of acquiring what we always called the English claims. The thirteen claims were jumped by Volkert and Francis, but I never considered their title to same good, or to be depended upon to rest with, the Black Daisy, Herbert, Mollie and Anita, were, however, valid locations of Volkert, or Volkert and Klug, and were considered of value on account of their locations. At the time these purchases were made by the Mammoth Copper Company, the Nielsens were still owners of their interest in the Nielsen Mining and Smelting Company and as you know I subsequently purchased the interest of the Nielsens in the Nielsen M. & G. Co., now known as the Silver Bell Copper Company, as you know we had been trying for a long time to acquire these properties now held by the Mammoth Copper Company and had made many efforts in various directions to secure the same but without avail. It was necessary, however, to procure the original title from the English people, which in a measure I tried to secure by correspondence, through various sources but was only able to consummate a transfer of the property when I met the principals in Europe. Without these properties the value of our properties would have been very much reduced. In fact, I don't know if a sale could have been made at all to any syndicate without including same. Our best showing and values are on the properties, 687 and if you will read the Johnson report, you will note that he estimates the tonnage of the Old Boot at 50,000 tons, whereas on Southern Beauty and other of these groups 250,000 tons. Owing to the Silver Bell Copper Company having no means to avail themselves of this purchase, and owing further to the fact that our firm was already very largely involved with the Silver Bell Copper Company much more than had at any time been contemplated. I undertook to advance the money to carry out these purchases personally and offered to turn them over to the Silver Bell Copper Company in writing, whenever I should be reimbursed for

the moneys I had expended in acquiring same. The amount of money the company has now paid me and the Mammoth Copper Company is the actual amount which I have disbursed in connection therewith with interest on such disbursements at rate of 12 per cent per annum. In this is included the \$2,000 I paid Nielsens, and I herewith enclose a condensed statement thereof. I am obligated to pay \$10,000 to the Nielsens when we sell the property, and also to Francis & Volkert on November 1st, 1903, \$12,500, which covers all obligations in connection with this purchase. In no way have I aimed to either charge one dollar more than was actually disbursed in these matters, nor to have personally availed myself of

688 acquiring the benefit thereof. The Silver Bell Company have always claimed ownership of these particular mines under their option of mine to purchase same. I considered them

a good purchase at the time and wanted the company to have the benefit thereof, realizing, however, that in all this I was assuming all the risk of holding the properties with no share of any profits in the sale thereof and not even an obligation on the part of the Silver Bell Copper Company to reimburse me, unless they so chose. I consider that the main value of this sale is centered on these mines, and I think every mining engineer will agree with this, notwithstanding this, I turned them over to the company upon the actual amount of my disbursements plus interest at 12 per cent and they assume in addition the payment I am obligated to make to the Nielsens and Francis and Volkert. You can therefore see how unjust and unreasonable your insinuations are in inferring that I have aimed in any manner whatsoever to take advantage of either you or the company. I justly think that I am entitled to a reasonable compensation for the valuable services that I have performed, not alone in negotiating the purchase of these properties at a price and upon terms so favorable but also in the services I have rendered in the sale just made, all of which has * * * to the benefit of this company. I consider that I have negotiated a most favorable sale, and I don't think there will be any doubt but that

every payment will be met at maturity. I have done so at an

689 expenditure of a commission of \$10,000, paid to Murphy, the other \$12,500 being paid by the purchasers, when a commission of 10 per cent would have been considered reasonable, and in addition to this we get interest on our money, which makes quite a sum. The matter of my services, however, can be left for the future. I do not want one dollar from you or this company that I am not justly entitled to and fully earned, nor do I want to detain your money one day longer than necessary. An indemnity holding me harmless from all the obligations I have personally assumed is all that will be asked to distribute the same. I want you to appreciate what I have done and accomplished in all these matters and not jump at conclusions as you have. You must remember that this is not a co-partnership, but a corporation. I have never reproached you for anything you have ever done in mining business or otherwise. The value of services, however, is generally reasoned by their importance, and above all, by the results that they accomplish. I must say that in all this Mr. Curtis

has done all that any living soul could do either to put the property in condition to reimburse us and particularly to make the sale, and while he will get a handsome sum out of this, he has justly earned every dollar of it and am glad it has turned out so well. The plans of the new company are such that we are bound to get our money before they really know what they have, though I do believe 690 they will have a good property in time, but they have yet to make it. I send you a Phoenix paper and you will see why they will have to take this property. The lawyers seemed to think there was no obligations in the carrying out the American Metal Company contract that it had expired and probably was not further thought of by them. In any event, I don't think there will be any trouble about this.

Regarding Franklin bill. He was our regular attorney, and I did not think nor believe it necessary to do so. I was more than surprised to have him make a claim of \$50,000 for his services but said he could accept \$25,000. I think both sums ridiculous, and am satisfied he will never get same. I thought we ought to have paid him \$2,500 to \$5,000. I believe it probably can be settled for that latter figure. A certain Judge Burnett in Phoenix, with whom I had some correspondence about a sale of property, claims a commission, but I don't think there is anything in his claim. Alfred Donau claims a commission for having brought Gov. Murphy to us, which he did, and I know done considerable in getting the Governor started on same. I have agreed to allow him \$2,500 out of the next payment for his services, and if it had been a stranger he would get a great deal more. He made several trips to Phoenix at his own expense, and all correspondence with Governor was through him.

691 I will send you a statement of Silver Bell and answer other parts of your letter tomorrow. With much love to all,

Your Sincere Nephew,

ALBERT.

EXHIBIT 106.

Letter Steinfeld to Zeckendorf June 5, 1903.

I refer to mine of yesterday. I enclose you herewith statement of how we stand with Silver Bell Copper Company. The item of interest is pending. I shall draw to pay note Bank of California \$5,000 today. Believe you will have ample funds to meet same and would like to take up \$5,000 in *which* local bank. I also enclose herewith 250 shares Silver Bell Copper Company. I have divided up the certificates of 529 shares due to the firm, and in lieu thereof issued 250 shares to you, 249 shares to me and one share to R. K. Shelton, which is to be mine and 30 shares to me as trustee for J. W. Zeckendorf. The sale of the property now being made, it is better that the stock should be divided up.

EXHIBIT 107.

Zeckendorf to Steinfeld, June 18, 1903.

I have received both your favors of the 4th and 5th insts. with enclosures. I'd like to know how I could understand the
692 transaction of the Mammoth Company without his telling me a word about it although the opportunity has offered itself various times to explain matters to me.

Two years ago I ascertained through the Nielsens the deal of 300 shares of Silver Bell Stock afterwards admitted to be correct. You told me that besides you promised to pay \$10,000; you paid him \$2,000 cash down. I said then that inasmuch as the stock was purchased for the interest of the Silver Bell our firm should refund you the money. You said, never mind, the concern owes our firm enough; and I remarked that this was very kind of you.

After making inquiries what had become of these 300 shares purchased, no one could give me any satisfactory explanation. Mr. Curtis told me last year that he did not know that he ever signed any agreement between the Silver Bell and the Nielsens, and Mr. Cooper could not remember that he had taken this agreement to Silver Bell and made Nielsen sign it and acknowledge the same before him as notary, and of the other deal you explain now you did not tell me a single word. Now, if we relate this transaction to any intelligent person what conclusion must he come to? You
purchased these mines of Volkert and others for your interest and speculation with the expectation to develop another Old Boot, and
as these expectations were not realized the Silver Bell had to
693 reimburse you. I do not doubt you meant well, but why I was kept in ignorance of this affair puzzles me.

EXHIBIT 108.

Steinfeld to Zeckendorf.

JUNE 17, 1903.

After writing you last Franklin has brought suit on his agreement as per enclosed copy of complaint. Fearing that he would attach or garnishee the notes on the 11th inst. I sent them to the Bank of California, with the instructions to pay the proceeds to the stockholders of the Silver Bell Copper Company after first depositing to my credit \$100,000 to meet all pending obligations. Whatever sum may remain in my hands in excess of meeting such obligations will also be divided in proportion to each shareholder. I believe therefore, that I have placed both the notes and proceeds of same beyond his reach. I consulted Rochester Ford as to whether this could be done legally and he approved the same. Franklin is entirely wrong and can be so proven in most of the claims of services referred to. In no way was he instrumental in securing the English properties. He was representing Hill and the Globe Minerals Exploration Company and secured Judge Wright in securing the Francis and Volkert title.

694

EXHIBIT 109.

Zeckendorf to Steinfeld.

JUNE 26, 1903.

I have received yours of the 17th inst. covering the complaint of Franklin which was no surprise to me. A regular blackmailing affair. You made him and now he goes back to you.

EXHIBIT 110.

JUNE 30TH, 1903.

Mr. Louis Zeckendorf, 320 Broadway, New York.

DEAR UNCLE: Yours of the 18th inst. at hand. The reason that I never went into the details of these mining properties was that I did not want to burden your mind with the fact of the large disbursements I personally made, and the large personal obligations I assumed in carrying of same out. After our sad experience with the Ray, never expected the firm to ever get involved in this way again. When the original Old Boot was first leased to Nielsen, we believed the property would take care of itself and the advances made him were based on ore values and smelter product which was not realized.

When we subsequently organized the Nielsen M. & G. Co., it
695 was to protect these advances. No one will or can ever know the worry and anxiety I went through in the various stages of this operation, and it is needless to refer to same, except to say that it was never contemplated that we should ever get involved to such an extent as we did. I involved my personal money and undertook and assumed obligations which this company had the option to take up and repay me my disbursements. While I at all times recognized the value of these properties, either by themselves or otherwise, I never aimed at any time to personally avail myself of same. I assumed all the risk and the company got all the profits. This same applies to the purchase of the Nielsen stock and interest. I used my personal money in its purchase and personally assumed the obligation of its first payment. You have a copy of this contract which speaks for itself. I don't think you will doubt for a moment that I could have purchased and secured all this without considering this company, for you must not forget that this was not a co-partnership, but an incorporated company, in which our firm were simply shareholders, and there is nothing that could have prevented me from maintaining an independent attitude. I assumed however, to have this company avail themselves of my personal efforts and personal investments and obligations I have assumed, without any profit to me. I do expect, however, that this company shall pay
696 me for these services, as also for the successful and unprece-

dented negotiations which ended in the consummation of a sale of this property upon terms and at an expense rarely heard of in a deal of this magnitude. This claim I don't make to you, but to the Silver Bell Copper Company, a corporation in which our men were simply stockholders. This company has had all the

benefits of my efforts has made a handsome profit out of the same and can well afford to pay me what I don't think there can be any question about that I am entitled. I deny that you offered to return me the money which I had paid the Nielsens. You did say that I was very considerate making such advances personally for this company.

* * * will be no trouble about that metal contract. I am satisfied that will all be arranged satisfactorily. Probabilities are the metal company will pay no more attention to me.

Regarding Franklin, I have already written you. The three hundred shares of stock formerly belonging to C. R. Nielsen, stand in my name as trustee, and I decline to divide same. What ever dividends may be declared in the future, in which these shares participate will be properly apportioned by me after the shareholders have indemnified me fully in all matters I have assumed in their behalf, and have relieved me of the many obligations in connection therewith, as also paid me for my claim of services, heretofore
697 referred to, which is to be satisfactorily agreed on. If we can not agree on this, I am willing to have it either arbitration or a court of justice.

Regarding our last year's inventory, I am in hopes of closing same up as best we can temporary. We have found an error of \$21,000 in the additions of the previous warehouse inventory, where I surmised it was. I shall have our books gone over and audited, and am now on the track of the right man for this and hope to make several changes in this direction. I am sorry that you are complaining about your health. I am also more than anxious that whatever conclusions about our business that come to, should be consummated with as little delay as possible. My offer to buy you out in my last was exactly in accordance with our conversation when last in New York. If this plan does not suit you and you will not buy me out, we must wind up. I wish to disabuse your mind, however, of the length of time and more especially of the * * * of all outstandings in such event. The losses in such circumstances will be tremendous, and in addition, tedious. Your method of disposing of the real estate is also not practicable, as each piece is different. If there were twelve vacant lots in a block they could be divided this way, but not as our property and — are. I have repeatedly told you that I did not put your Ray money in the business, that I had nearly as
698 much with the firm as you had, and I further say that you have no right to charge more than 6 per cent per annum in accordance with our contract and my repeated letters on this subject, and that I never knew you were charging more than 6 per cent until I noticed it on books.

I furthermore showed you where you had cleared the \$250.00 (?) you refer to over and above what you were entitled to have many times over. It is unjust for you to make any insinuations about what the firm has paid me. I have been more than conscientious in my personal dealings with the firm, and I have never been allowed a cent I was not entitled to; on the contrary, there are thousands of dollars that have been personally disbursed by me, that should have been paid by the firm. We have placed most of our orders by retail. This

will * * * on a most limited scale. I have no doubt but that we will arrive at some reasonable solution as to the future of this business, and we must have our goods in time to be prepared to compete for business. The outlook for business this coming season is very good and we ought to show quite an improvement.

I closed up the business, which was in charge of *of* Walter and same turned out very bad. One loan will be over \$5,000. Walter left here for California a few days ago. He will be at Linda's wedding in

Los Angeles today, and then go to the city, where he expects 699 to locate in the future. He is very ambitious and good too,

but requires experience and more application. I understand Linda is getting a very nice young man for a husband. They have known each other for some time, and I hope they will be happy.

Business is keeping up quite well. Reports from Silver Bell are very favorable, and I don't doubt that they will send each payment when due. In fact, I believe that they will take up the entire obligation this fall, and * * * the * * * East. We had a narrow escape Sunday at our warehouse. The San Xavier Hotel burned to the ground and twice our place caught on fire in the yard. The company will not rebuild the same.

My family are all in San Francisco since last month and I expect to leave for there next week. I feel very much run down again and require a change very much.

With much love to all.

Your sincere nephew,

ALBERT.

EXHIBIT 111.

Steinfeld to Zeckendorf.

AUGUST 27, 1903.

Nothing.

EXHIBIT 112.

Steinfeld to Zeckendorf.

700

SEPTEMBER 30, 1903.

The firm is not further interested in Silver Bell Company, the debt is paid. There can be no dividends by S. B. C. Co. until its obligations are first settled. When the next payment is made in November, a dividend can probably be declared and paid after making provisions to meet its obligations, provided the individual shareholders will indemnify me for the obligation I have assumed, etc., as already written.

EXHIBITS 113 TO AND INCLUDING EXHIBIT 124.

Books.

EXHIBIT 125.

Minutes.

EXHIBIT 126.

Minutes.

EXHIBIT 127.

Minutes.

EXHIBIT 128.

Wm. Zeckendorf account of stock purchase by A. S. June 18, 1904.

EXHIBIT 129.

701 Cash Received.

1903.

May 20.	Imp. Copper Co. 1st payment.....	\$115,000.00
Aug. 23.	Imp. Copper Co. 1st note.....	101,500.00
Nov. 23.	Imp. Copper Co. 2nd note.....	102,987.00

1904.

Jan. 20.	Sale of last two notes.....	207,934.00
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\$527,421.50

Disbursements.

1903.

May 21.	L. Zeckendorf & Co.....	\$74,383.00
May 21.	N. O. Murphy, Com.....	22,500.00
May 21.	Albert Steinfeld, contract.....	18,117.00
Aug. 23.	L. Zeckendorf & Co.....	35,000.00
Sept. 4.	L. Zeckendorf & Co.....	5,000.00
Oct. 20.	F. J. Heney, retainer.....	1,500.00
Nov. 25.	Smith & Ives, retainer.....	1,500.00
Jan. 21.	L. Zeckendorf & Co.....	175.37
Jan. 21.	E. S. Ives.....	114.00
	Mrs. Nielsen, contract.....	10,000.00
702	Mrs. Francis, contract.....	12,700.00

\$180,793.77

Balance on hand	346,627.73
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\$527,421.50

Value per share, \$195.1814.

Value 250 shares, \$123,796.25.

EXHIBIT 130.

Minutes.

EXHIBIT 131.

Tenth meeting of directors.

EXHIBIT 132.

Minutes.

EXHIBIT 133.

(This is the long agreement prepared by Franklin for May 20, 1903, and not executed. Set out in full at page 587.)

EXHIBIT 134.

Agreement of May 20, 1903, between Steinfeld, Mammoth Copper Company and Silver Bell Copper Company, set out in full at page 600, folio 1793 of this abstract.

EXHIBIT 135.

Meeting of the directors, May 20, 1903, set out in full folio 1557, page 521 of this abstract.

703

EXHIBIT 136.

Option to Beaton.

EXHIBIT 137.

Steinfeld proposition of July 15, 1901, set forth in full commencing folio 1695, page 567 of this abstract.

EXHIBIT 138.

Letter from Curtis to Steinfeld, May 25, 1901.

If you cannot sell to some good people why not try and sell the 30 per cent held as trustee to some friends who would always be with you in the future management. Sell this 30 per cent for enough to pay all debts and give us a little surplus in the treasury. Then I think our future would be assured. I would certainly do one or the other.

EXHIBIT 139.

For identification Curtis to Steinfeld—June 9, 1901.

For my part I wrote you when in Europe what I thought we had in Old Boot. Today, thank God, I have proven every word I wrote you ten times over. I would not ask less than \$750,000 for the property. The ore is sulphide. We are working in eight places today and every one in good sulphide ore.

704

EXHIBIT 140.

Curtis to Steinfeld.

JUNE 10, 1901.

Nothing.

EXHIBIT 141.

Curtis to Zeckendorf.

NOVEMBER 4, 1901.

The Old Boot still all right. We are now on the Imperial mine (one of the Silver Bell purchase) which is proving to be very good; also a fine showing on the Southern Beauty (another of the Silver Bell purchase). These two mines are liable to change matters very much and raise the selling price probably double what we were asking. I shall push the work all I can on these mines, first for the carbonate ore they are producing, and second, to prove their market value.

EXHIBIT 142.

Curtis to Zeckendorf.

NOVEMBER 10, 1901.

In regard to the new find on Imperial and Southern Beauty, the ore we have taken out is of good quality and the showing
705 good and more extensive every day. This is liable to make the property quite valuable, and if we were out of debt, I would certainly advise going very slowly (as long as this new work is proving a showing of so much ore in sight) in regard to selling or even putting a price on the property. The month's work may show several times the tonnage of the Old Boot. What we have done has shown very large ore bodies on good ore.

EXHIBIT 143.

Curtis to Zeckendorf.

NOVEMBER 17, 1901.

The Old Boot mine about the same and new finds on the Imperial and Southern Beauty. I am pushing all I can to get the ground opened up to show and prove results and value. This will take time, but so far everything is very satisfactory and we are getting enough ore from the new work to more than pay the expense of opening up.

EXHIBIT 144.

Curtis to Zeckendorf.

NOVEMBER 27, 1901.

The Old Boot about the same. The work and surveys on
706 new finds progressing favorably. The new ore is a guaranty for carbonate ore; so no more roasting for a long time to come.

EXHIBIT 145.

Report dated March 24, 1901,—Curtis to Zeckendorf.

Considers all mines property of Silver Bell Copper Company.

EXHIBIT 146.

Minutes.

EXHIBIT 147.

Complaint—stockholders' suit San Francisco, which Ives had in his hands at stockholders' meeting, set out in full at page 605 of this abstract.

EXHIBIT 148.

Letter.

Smith & Ives to Zeckendorf.

DECEMBER 19, 1903.

The minute book of Silver Bell Copper Company is at our office subject to your inspection.

EXHIBIT 149.

707 Silver Bell Copper Company in Account with Albert
Steinfeld.

1903.

Aug. 23. by cash, note Imp. Cop. Co.	\$101,500.00
Contra.	

Aug. 23. To cash, note Imp. Copper Co. . . .	\$35,000
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To cash F. J. Heney	1,500
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To cash L. Zeckendorf & Co.	5,000
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	41,500.00
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	\$60,000.00
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EXHIBIT 150.

Of no consequence.

Defendants' Exhibits.

EXHIBIT A.

Map.

EXHIBIT B.

Letter of Percy Williams to Steinfeld.

EXHIBIT C.

708 Book of 6 per cent bonds of Development Company of America; used in connection with deposition of Percy Williams.

EXHIBIT D.

Minute Book.

EXHIBIT E.

TUCSON, A. T., Feb. 7, 1901.

Albert Steinfeld, Esq., San Francisco, Cal.

DEAR ALBERT: I was pleased to receive your kind favor of the 1st inst. and again I wish to congratulate you all for the happy arrival of Miss Lucia (first letter of your dear mother name) and I can easily imagine how happy you are all over the new corner. Hugo has written you yesterday about Melzer. I think the Am. Metal Co. would allow us fully 2 per cent commission on the prices given to him. The combination advanced the tolls considerable, just as I expected. I also fear the new deal with the S. P. R. R. and U. P. will not benefit us. Curtis writes from the mines that the smelter started on the 1st and produced six tons matte., and on the 2nd, twelve tons; the roads are very bad and it rained again last night very heavy and a big washout somewhere west the trains are about ten hours late; as soon as the road gets dry I will go to
709 Silver Bell and see the working of the property. Hugo keeps you posted and I need not repeat we are getting along very fine, and you need not hurry to return until dear Bettina has fully recovered her health.

With fondest love to you, dear Bettina, Lester, Irene, Harold and baby,

I Am Affect.

LOUIS.

EXHIBIT F.

Zeckendorf to Steinfeld.

FEBRUARY 19, 1901.

I have been several days at Silver Bell to acquaint myself with our interests there. I notice a good many improvements since my last visit there and everything looks prosperous. I did not go down into the mine but through maps have a fair idea, how it must appear, which is rather in a doubtful condition. I feel nervous about our enormous investment and everything depends on the developments of the ore body.

EXHIBIT G.

Letter Lilienthal to Ives, Dec. 2, 1903.

The minute book is, of course, at your service, and under the

710 circumstances I am not sending it to you yet. Would it be agreeable to you to let us have copies of the agreements referred to in the minutes as being authorized by the Board but not in effect set out either literally or in substance.

EXHIBIT H.

L. Zeckendorf v. Steinfeld—Complaint; action for indebtedness.

EXHIBIT I.

Affidavit Zeckendorf for attachment, set forth in full folio 614, page 207 of this abstract.

EXHIBIT J.

Certified copy of complaint in stockholders' suit, set forth in full page 605, folio 1808 of this abstract.

EXHIBIT K.

Extract from General Ledger No. 9, L. Zeckendorf & Company.

Cash 2-c	Silver Bell Copper Company.	Red Rock.
1901 (Page 230)	1901	(page 234)
May 27. Expo. 35, Expo.....		\$1.00
Frts. 79 94.70.....		2.20
1210.18		2.21
Aug. 22 Cash A. Steinfeld. Spl. checks 5-28 270		\$1150.17.

711

EXHIBIT L.

Abstract from General Ledger No. 9, L. Zeckendorf & Company, Albert Steinfeld, special.

1901.

Aug. 22 S. B. Cop. Co. 270 \$1150.17.

EXHIBIT M.

Abstract from Cash Book No. 14, L. Zeckendorf & Company.

1901. (Page 221).

May 28 230 S. B. Cop. Co. 895	43.76	
	860	8.00
	825	8.25
	928	950.17
	929	200
		1210.18

(Page 270).

Aug. 22 609 Albert Steinfeld Special Sfd. to S. Bell Cop. Co. 950.17
200.00.....1150.17

EXHIBIT N.

Abstract from Cash Book No. 14 L. Zeckendorf & Company.

1901. (Page 270).

Aug. 22	230	Silver Bell Copper Co. Co. Chgd. to A. S. Spec. cks	
	5-28	950.17	
		200.00	1150.17

712

EXHIBIT O.

Abstract from Cash Book No. 14 L. Zeckendorf & Company.

(Page 271).

1901.

Aug. 23	230	Cr. S. B. Cop. Co.	1348	9.60	
			1314	4.50	
			1352	23.00	
			1402	100.00	
			1384	2.75	139.85
Aug. 23	230	Co. S. B. Cop. Co.	1401	25.00	
			1365	3.17	
			1350	43.00	
			1351	203.89	275.06

EXHIBIT P.

Albert Steinfeld to L. Zeckendorf.

DECEMBER 20, 1904.

I hereby demand the immediate dismissal of the injunction suit instituted by you in the superior court of San Francisco, State of California, against me, the Bank of California, Silver Bell Copper Company and others, and I will comply fully and faithfully with the terms of the contract existing between me and the Silver Bell Copper Company, copy of which was given you on Saturday, December 19, 1903, and bearing date 20th of May, 1903.

EXHIBIT Q.

Escrow instructions to Phoenix National Bank, May 20, 1903.

In case of failure of Imperial Copper Company to pay, you are to deliver to Albert Steinfeld or his legal representatives, or to the grantors and makers of said deeds and bill of sale or to their joint written order the said deeds and bill of sale.

EXHIBIT R.

Bill of sale by Mammoth Copper Company, Silver Bell Copper Company and Albert Steinfeld, and quit-claim deed of Bettina Steinfeld—all placed in escrow with Phoenix National Bank.

EXHIBIT S.

Rescission agreement December 26th, 1903, set out in full page 613, folio 1832 of this abstract.

EXHIBIT T.

Silver Bell Minute Book.

EXHIBIT U.

Injunction order in San Francisco suit.

714

EXHIBIT V.

Agreement 20th of May, 1903, between Mammoth Copper Company, Silver Bell Copper Company, Albert Steinfeld, parties of the first part, and Imperial Copper Company, party of the second part, provides for the purchase of property and placing deeds in escrow.

EXHIBIT W.

Deed Fred Clark Beckwith, Tucson Mining and Smelting Company and Herbert Tenney to Albert Steinfeld—being Exhibit 7 in the Franklin suit.

EXHIBIT X.

Plaintiff's Exhibit 7 in Franklin suit.

EXHIBIT Y.

Book.

EXHIBIT Z.

Draft proposition of compromise suggested by Lilienthal.

EXHIBIT AA.

Letter Zeckendorf to Steinfeld Dec. 22, 1899.

Referring to my letters of the 20th inst. and have received yours of 15th. I cannot see how you can get involved in mines to a larger

715 amount than you have security. I am anxious to know how we stand with Old Boot. We had a terrible panic here this week and matters are shaky yet.

Zeckendorf to Albert Steinfeld.

OCTOBER 30, 1899.

Referring to my letters 20th inst., I have received yours 20th. I hope you will not permit this account to increase. It is really strange that we always have some elephant to carry.

EXHIBIT BB.

Zeckendorf to Steinfeld—March 16, 1900.
No consequence.

EXHIBIT CC.

Letter Zeckendorf to Steinfeld, April 25, 1900.

I was surprised and no doubt you also to see the large amount we owe and the enormous amount in the books. The way our business is doing must be owing to the fact how our books are kept.

EXHIBIT DD.

Letter Zeckendorf to Steinfeld, August 1, 1900.

716 Whenever the Old Boot is in good shape to be shown let me know and I will notify my party. I hate to have so much money tied up in so many enterprises which is actually a dead capital.

Also May 9, 1900.

Mr. Hill said when he meets you he will talk to you again about Silver Bell. He has no use for Curtis. He does not speak the truth and the trouble was that you believe him like Jesus. If he had the least ideas about mining he had a chance to clear us out of the Old Boot in fine shape, but he mismanaged the affair terribly. Hill speaks of Wilson as a good man if you watch him. His wife is the boss and does not give him the best advice.

EXHIBIT EE.

Zeckendorf to Steinfeld, June 2, 1900.

I hope the Old Boot will turn out satisfactory yet. Such investments to tie up such large amounts of money does not pay us and I notice you keep us very short in money while we ought to be flush. We have too much outstanding.

EXHIBIT FF.

Zeckendorf to Steinfeld, June 17, 1901.

I am now receiving a regular report from the Silver Bell which is very convenient for me. I have named the price for the purchase Silver Bell \$500,000.

717

EXHIBIT GG.

Zeckendorf to Steinfeld—September 3, 1901.

The Old Boot has been offered for sale by two other parties one with which Mr. Wemple is connected. I hope you will be able to make a deal as this is too heavy load for us to carry.

EXHIBIT III.

Zeckendorf to Curtis.

DECEMBER 14, 1901.

I have received your favor December 3. I have no doubt if you had a more suitable plant the results would be more satisfactory. At the same time we have to take into consideration the large amount of indebtedness at present due to our firm which I desire to have reduced instead of increased.

EXHIBIT II.

Zeckendorf to Steinfeld—May 21, 1903.

I had great anxiety and fear something might happen not to consummate the deal. I congratulate you for your success and I think we might all have reason to be very happy.

EXHIBIT JJ.

Read into the records. Pages 513, 514, and 515 press copy, letter book Albert Steinfeld.

718

EXHIBIT KK.

Guaranty Agreement, set out in full at folio 1743, page 583 of this abstract.

EXHIBIT LL.

Deed Carl Nielsen and Mary Nielsen to Albert Steinfeld, June 29, 1900, conveys one half interest in the "Identical" mine.

EXHIBIT MM.

Pages 513, 514, and 515 of Albert Steinfeld's private letter book. Read into the records.

EXHIBIT NN.

Withdrawn.

EXHIBIT PP.

No. 478. Tucson, Arizona, 12-26, 1903. Consolidated National Bank.

TUCSON, ARIZONA.

Pay to J. N. Curtis, President Silver Bell Copper Co., or order One Hundred and Seventeen dollars (\$117).

ALBERT STEINFELD.

Same paid Jan. 19-04.

Endorsed: Pay to the order of Arizona National Bank, Tucson, Arizona, J. N. Curtis, president and treasurer Silver Bell Copper Company.

No. 1154

TUCSON, ARIZONA, Dec. 26, 1903.

L. Zeckendorf & Company, Bankers, Tucson, Arizona.

Office of L. Zeckendorf & Co., Tucson, A. T.

The Silver Bell Copper Company has deposited with us eighteen thousand and no-100 dollars, to the order of itself. Payable on return of this certificate properly endorsed. \$18,000.00.

L. ZECKENDORF & CO.

Endorsed: The Silver Bell Copper Company, By J. N. Curtis, president and treasurer.

Cancelled by reissuance of check No. 1194 Consolidated National Bank, \$18,000, and reissuance certificate \$10,000 L. Zeckendorf & Co. Stamped: Paid Jan. 22, 1904, L. Zeckendorf & Co.

EXHIBIT QQ.

Checks.

Clearing House No. 1

No. 215.

TUCSON, A. T., Dec. 26, 1903.

The Bank of California:

720 Pay to the order of J. N. Curtis, president and treasurer Silver Bell Copper Co., Eight Thousand Five Hundred Dollars.

ALBERT STEINFELD.

Endorsement: Pay to the order of Arizona National Bank, J. N. Curtis, president and treasurer.

Pay to the order of London, Paris & American Bank, Ltd., San Francisco, Cal. Prior endorsements guaranteed. The Arizona National Bank, Tucson, Arizona—L. M. Jacobs, Cashier.

Stamped: Paid Jan. 19, 1904. Bank of California Clearing House.

No. 30.

TUCSON, ARIZ., Jan. 16, 1904.

The Arizona National Bank:

Pay to the Silver Bell Copper Company or order bearer (-43750)
 Forty-three Thousand Seven Hundred and fifty dollars.

ALBERT STEINFELD.

Stamped: Paid Jan. 16, 1904. Arizona National Bank.

Endorsed: Pay to the order of Arizona National Bank, Tucson,
 Arizona. Silver Bell Copper Co. By J. N. Curtis, president and
 treasurer.

721 No. 18.

PHOENIX, ARIZ., Dec. 26, 1903.

Phoenix National Bank:

\$1500.

Pay to J. N. Curtis, president and treasurer Silver Bell Copper
 Company, Fifteen Hundred Dollars.

ALBERT STEINFELD.

Stamped: Paid Jan. 19, 1904, Receiving Teller.

The Phoenix National Bank, Phoenix, Arizona.

Endorsed: Pay to the order of Arizona National Bank, Tucson,
 Arizona. J. N. Curtis, president and treasurer Silver Bell Copper Co.

Pay Phoenix National Bank, or order

Arizona National Bank, Tucson, Arizona.

In the District Court of the First Judicial District of the Territory
 of Arizona in and for the County of Pima.

3483. Louis Zeckendorf, Plaintiff, vs. Albert Steinfeld, et al.
 Defendants.

722

Minute Entry of May 17, 1904.

3483. Louis Zeckendorf, Plaintiff, vs. Albert Steinfeld, et al.
 Defendants.

A jury having been demanded by defendants, it is ordered that
 this cause be set for trial by jury Wednesday, June 15, 1904, at 9:30
 o'clock a. m.

Minute Entry of November 10, 1904.

3483. Louis Zeckendorf, Plaintiff, vs. Albert Steinfeld, et al.
 Defendants.

By agreement of the parties hereto, it is ordered that this cause be
 passed on the calendar.

Minute Entry of May 8, 1905.

3483. Louis Zeckendorf, Plaintiff, vs. Albert Steinfeld, et al.
 Defendants.

It is by the court ordered that this cause be set for trial Tuesday,
 May 16, 1905, at 9:30 o'clock a. m.

First Minute Entry of May 16, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

On motion of counsel for the plaintiff, it is by the court ordered that Frank W. Doan, Esq., be and he is hereby entered as associate counsel for the plaintiff herein.

723 *Second Minute Entry of May 16, 1905.*

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

On motion, and in accordance with the stipulation filed herein May 15, 1905, it is by the court ordered that the clerk of this court amend the complaint herein filed, January 27, 1904, by running a red ink line through paragraph 111, as now in said complaint, and thereon pasting over said old paragraph 111 the new paragraph to be substituted therefor as set out in said stipulation.

Third Minute Entry of May 16, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause came on this day regularly for trial, in the presence of and before the court sitting without a jury, a jury having been expressly waived in open court by the respective parties hereto, Edwin A. Meserve, Esq., Messrs. Hereford & Hazzard and Frank W. Doan, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Whereupon, on application, the plaintiff is granted leave to amend his complaint herein, instant, by interlineation. And thereupon, the de-

724 fendants stating that they did not desire to urge their demurrer to the complaint of the plaintiff herein, the same was by the court overruled. Counsel for the respective parties then made a statement of the case to the court, and thereupon the further trial of the cause was ordered continued until Wednesday, May 17, 1905, at 9:30 o'clock a. m.

Minute Entry of May 17, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from yesterday's session of this court, come now the same parties hereto, into open court, and the trial proceeds as follows: By stipulation of counsel for the respective parties, a map is introduced in evidence and marked "Defendant's Exhibit A," prior to the introduction of testimony by the plaintiff. And thereupon, the plaintiff, to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as

witnesses the following named persons, to-wit: Ben Goodrich and Louis Zeckendorf, the plaintiff, who were duly sworn, examined and cross-examined. And this being the usual hour of recess, the further trial of this cause is now ordered continued until Thursday, May 18, 1905, at 9 o'clock a. m.

725

Minute Entry of May 18, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from yesterday's session of this court, come now the same parties hereto, into open court, and the trial proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, introduces further documentary evidence, and recalled as a witness Louis Zeckendorf, the plaintiff, who was further examined and cross-examined, and also called as a witness the following named person, to-wit: Selim M. Franklin, who was duly sworn, examined and cross-examined. And this being the usual hour of recess, the further trial of this cause is now ordered continued until Friday, May 19, 1905, at 9 o'clock a. m.

Minute Entry of May 19, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from yesterday's session of this court, come now the same parties hereto, into open court, and the trial proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, introduces further documentary evidence,

and also calls as a witness the following named person to-wit: Albert Steinfeld, one of the defendants herein, who was duly sworn and examined, as if under cross-examination, as provided by law, and also calls as a witness the following named person, to-wit: Mary Nielsen, who was duly sworn, examined, and cross-examined and also recalled as a witness Selim M. Franklin, who was further examined and cross-examined. And this being the usual hour of recess, the further trial of this cause was ordered continued until Saturday, May 20, 1905, at 9 o'clock a. m.

Minute Entry of May 20, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from yesterday's session of this court, come now the same parties hereto, into open court and the trial proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, introduced certain documentary evidence, and also certain written testimony, and recalled as witnesses Selim M. Franklin and Louis Zeckendorf, who were further examined and cross-examined and called as witnesses the following named persons,

to-wit: J. N. Curtis and R. K. Shelton, who were duly sworn, examined and cross-examined. And this being the usual hour of recess, the further trial of this cause is now ordered continued until Monday, May 22, 1905, at 8 o'clock a. m.

727

Minute Entry of May 22, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from Saturday, May 20, 1905, come now the same parties hereto, into open court, and the trial proceeds as follows: The plaintiff, to further maintain upon his part, the issues herein, recalled as a witness, Louis Zeckendorf, the plaintiff, who was further examined and cross-examined and also called as witnesses the following named persons, to-wit: Frederick S. Nave, William Herring and Eugene S. Ives, who were duly sworn, examined and cross-examined, and thereupon on application, the plaintiff was granted leave to amend his complaint herein instantler, by interlineation, and the clerk of this court was ordered to amend this complaint by pasting over paragraph IV, as now in said complaint, a new paragraph to be substituted therefor, and also to add a new paragraph, to be numbered paragraph IX of said complaint, both of which new paragraphs are now agreed to and submitted for the purpose of such amendment, and thereupon the plaintiff rested his case. The defendants then, to maintain upon their part, the issues herein introduced certain documentary evidence and certain written testimony, and also called as a witness, the following named person, to-wit: Eugene S. Ives, who was duly sworn, examined and cross-examined. And this being the usual hour of recess, the further trial of this cause is now ordered continued until Tuesday, May 23, 1905, at 9 o'clock a. m.

728

Minute Entry of May 23, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from yesterday's session of this court, come now the same parties hereto, into open court, and the trial proceeds as follows: The defendants, to further maintain upon their part the issues herein, introduced further documentary evidence, and also called as witnesses the following named witnesses, to-wit: J. N. Curtis and Albert Steinfeld, who were duly sworn, examined and cross-examined. And this being the usual hour of recess the further trial of this cause is now ordered continued until Wednesday, May 24, 1905, at 9 o'clock a. m.

Minute Entry of May 24, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al., defendants.

This cause having been continued from yesterday's session of this court, come now the same parties hereto, into open court, and the

trial proceeds as follows: The defendants, to further maintain
729 upon their part, the issues herein, recalled as witnesses,
Albert Steinfeld and J. N. Curtis, who were further examined
and cross-examined and called as a witness the following named
person, to-wit: F. L. Culin, who was duly sworn, examined and cross-
examined, and also introduced the deposition of W. F. Staunton
heretofore taken before the court on the trial of this cause, and there-
upon the defendants rested their case. The plaintiff, then, in re-
buttal, recalled as witnesses, the following named persons, to-wit:
S. M. Franklin and Louis Zeckendorf, the plaintiff, who were further
examined and cross-examined, and thereupon the plaintiff rested his
case. The defendants then, in surrebuttal, recalled as a witness the
following person, to-wit: Albert Steinfeld, who was further examined
and cross-examined, and thereupon the defendants rested their case.
And there being no further testimony offered on either side, and the
evidence being closed, the further trial of this case was continued
for argument until Saturday, June 3, 1905, at 8 o'clock a. m.

Second Minute Entry of May 24, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al.,
defendants.

730 Upon application it is ordered that the defendants be
granted leave to withdraw Defendants' Exhibits NN and OO,
introduced in evidence upon the trial of this case.

Minute Entry of June 3, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al.,
defendants.

This cause having been continued from Wednesday, May 24,
1905, come now the same parties hereto into open court and the trial
proceeds as follows: Argument of the respective counsel was had
and thereupon it was agreed and ordered that further argument of
said cause be presented in written briefs, that of plaintiff to be filed
by June 23, 1905, the answering brief of defendant by July 13,
1905, and the reply brief by July 23, 1905.

Minute Entry of June 20, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al.,
defendants.

It is by the court ordered that counsel for the plaintiff be granted
until June 28, 1905, in which to file their brief herein, and that
counsel for the defendants be granted twenty days thereafter in
which to file their answering brief.

Minute Entry of September 16, 1905.

3483. Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, et al.,
defendants.

731 This cause having been tried and argued at previous ses-
sions of the present term of this court, and the written briefs

of counsel for the respective parties having been now filed herein, and the said cause being now fully submitted to the court, and the court being fully advised in the premises, finds the issues herein in favor of the plaintiff and against the defendants, and orders that judgment be entered herein in favor of the plaintiff, in accordance with the judgment signed and filed herein.

Minute Entry of September 21, 1905.

3483. Louis Zeckendorf, plaintiff vs. Albert Steinfeld, et al., defendants.

On their application, it is by the court ordered that the defendants herein be granted leave to file their supplemental answer herein.

First Minute Entry of October 21, 1905.

3483. Louis Zeckendorf, plaintiff vs. Albert Steinfeld, et al., defendants.

On their application, it is ordered that the defendants herein be granted leave to file an amendment to their original answer on file herein.

Second Minute Entry of Oct. 21, 1905.

732 3483. Louis Zeckendorf, plaintiff vs. Albert Steinfeld, et al., defendants.

This matter came on this day regularly to be heard upon the motion of the defendants for a new trial herein. E. A. Meserve, Esq., and Messrs. Hereford & Hazzard appearing as counsel for the plaintiff and F. J. Heney, and Eugene S. Ives, Esqs., for the defendants. The said matter was submitted to the court without argument and the court being fully advised in the premises, does overrule said motion; to which ruling of the court in overruling said motion, the defendants through their counsel, except and give notice of their appeal to the Supreme Court of this Territory.

And thereupon, on application of counsel for the defendants, it is ordered that a stay of execution be granted herein for a period of sixty days from this date.

Third Minute Entry of October 21, 1905.

3483. Louis Zeckendorf, plaintiff vs. Albert Steinfeld, et al., defendants.

On motion and by consent of counsel for the respective parties herein, it is by the court ordered that the judgment this day signed and filed herein, be modified in respect to the amount of the bond required to be executed by the receiver herein, the amount of said bond being now fixed at Ten Thousand (\$10,000.00) dollars.

733 TERRITORY OF ARIZONA,
County of Pima, ss:

I, Clinton D. Hoover, Clerk of the District Court, of the First Judicial District of the Territory of Arizona, in and for the county of Pima, do hereby certify that the annexed and foregoing is a true, perfect and complete copy of the Minute Entries of said Court, in a certain cause lately pending in said Court, wherein Louis Zeckendorf was the plaintiff and Albert Steinfeld, et al., were the defendants, being cause numbered 3483 in said court, as appears from the original records of the same remaining in this office.

Witness my hand and seal of said court affixed this 16th day of November, A. D., 1905.

[SEAL.]

CLINTON D. HOOVER, *Clerk*.

734 And on the same day, to-wit: the eleventh day of January, 1909, came the Appellant-Appellee by his attorneys, Messrs. Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., and filed in the clerk's office of said court, in said entitled cause, a certain Supplemental Abstract of Record in words and figures, after correction with the original papers on file in said cause, following to-wit:

735 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Defendants.

Third Amended Complaint.

Comes now the plaintiff in the above entitled action and files this, his third amended complaint in said action, and complaining of the above named defendants, for — of action alleges:

736

I.

That the defendant, the Silver Bell Copper Company, is now, and for all of the times herein mentioned, has been a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County of Pima in said Territory; that for all of the times herein mentioned subsequent to January, 1901, defendants Albert Steinfeld, J. N. Curtis and R. K. Shelton have been and now are the directors of said corporation, all of said parties being residents of said City of Tucson, County and Territory aforesaid;

That plaintiff for all of the times herein mentioned, has been and now is a stockholder of said corporation and he is now and, for all

of the times herein mentioned, has been a resident of the City of New York, State of New York;

That the entire capital stock of said corporation was divided into one thousand shares, all of which said one thousand shares
737 was originally issued by said corporation, for value, in accordance with the laws of the said Territory of Arizona; that thereafter, and prior to the 20th day of May, 1903, three hundred shares of the said stock were purchased by said corporation, the same being taken in the name of Albert Steinfeld, trustee; that at all times after said purchase, said Albert Steinfeld held said stock in his possession as trustee as the property of and for the benefit of said corporation; that since long prior to the said 20th day of May, 1903, the actual outstanding stock of said corporation has been seven hundred shares, divided, owned and held as follows: By Albert Steinfeld, two hundred and forty-nine shares; by R. K. Shelton, one share; apparently by J. N. Curtis, one hundred and seventy shares; by Albert Steinfeld, trustee for J. W. Zeckendorf, thirty shares and by this plaintiff, two hundred and fifty shares; that the said one share of stock standing upon the books of the company in the name of said R. K. Shelton was, in fact, the property and is now the property of said Albert Steinfeld and said R. K. Shelton, as
a matter of fact, has no interest or property therein;

738 That the said Mammoth Copper Company is now and, for all of the times herein mentioned, has been a corporation organized and existing under the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima county, said Territory; that the defendant Albert Steinfeld is now, and for all of the times herein mentioned, has been the owner in fact of all of the capital stock of the said Mammoth Copper Company; that any stock standing in the name of any other party in order to enable him to qualify as a director is simply held by said party for that purpose and the same belongs to, and is, in fact, the property of the said Albert Steinfeld, and the said Mammoth Copper Company, as this affiant is informed and believes and so alleges the fact to be, is but an instrument in the hands of the defendant Albert Steinfeld used by him for the business of transacting business for himself, in his own name and for the purpose of covering up any frauds or illegal transactions which he may enter into, or care to enter into
in the name of the said Mammoth Copper Company; that
739 any money which may, on its face, have been paid to the defendant Albert Steinfeld, and any property which may, on its face, have been delivered to the said Albert Steinfeld, as herein-after alleged and set out, for the benefit of the said Albert Steinfeld, and the said Mammoth Copper Company, jointly, in fact and in truth, were paid and delivered to the said Albert Steinfeld and were appropriated by him, to his own individual use; and that all acts and things done by him and in the name of the said Mammoth Copper Company, and all things received, given or paid by to or in the name of the said Mammoth Copper Company, were, in fact, acts, things done, received, given and paid by and to the said Albert Steinfeld;

II.

That the said R. K. Shelton, defendant, at all the times herein mentioned, has been the representative of the said Albert Steinfeld on said board of directors and, at all times herein mentioned, has voted as ordered, directed and requested by said Albert Steinfeld, and not otherwise; that said defendant, J. N. Curtis, at all 740 times herein mentioned, was under the control and direction of said Albert Steinfeld and, as a director of said corporation, at all times, did what the said Albert Steinfeld directed or requested and, at no time and under no circumstances, did the said J. N. Curtis, as director of the said corporation, do any act, take any vote, or cast any ballot, except as requested or directed by the said Albert Steinfeld; that the said Albert Steinfeld, at all of the times herein mentioned, was, in fact, by reason of his control of the other two members of the said board, in absolute control and direction of the board of directors of the said defendant corporation and all acts, things and votes taken by said board since before the 20th day of May, 1903, and up to and including the present time, were taken by and under the direction of the said Albert Steinfeld and at his request, and not otherwise, and all votes, motions, resolutions and other acts of said board adopted, passed or done by it were done by and under the direction of and control of the said Albert Steinfeld, and not otherwise;

That because of the facts hereinabove alleged, it would be 741 an idle and useless act for this plaintiff to make any demand whatsoever on the said board of directors to bring any action against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton for the recovery of the property belonging to the said corporation or for the payment to said corporation of any debt owing by said parties or either of them and particularly by the said Albert Steinfeld, to said corporation and that any such action, if brought in the name of said corporation, would not be prosecuted in good faith and with a full intent and purpose that a full recovery should be had thereon for the benefit of said corporation, and of this plaintiff, as a stockholder thereof; and for such reasons and because of such facts and because it would be idle and purposeless so to do, this plaintiff has made no demand whatsoever on said corporation that it bring this action or that it prosecute the same; and this plaintiff now brings this action as a stockholder of said defendant corporation for its use and benefit and in order that its property, illegally taken from it as hereinafter set forth, may be recovered and restored to its assets;

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III.

That ever since the year 1878 this plaintiff and defendant Albert Steinfeld were partners, doing business in the City of Tucson under the name of L. Zeckendorf & Company; that under and by virtue of the articles of partnership and contracts existing between plaintiff and said Albert Steinfeld, sixty-four (64) per cent. of said business and fifty-five (55) per cent. of the profits to be derived there-

from, except as to the profits to be derived from mines and as to mines and mining properties, was to go to this plaintiff, thirty-six (36) per cent. of the business and forty-five (45) per cent. of the profits to said defendant, Albert Steinfeld; that under and by virtue of said contracts the ownership of all mines that should be acquired by said firm and profits to be acquired by mining transactions were to be divided, fifty (50) per cent. to plaintiff and (50) per cent. to said Steinfeld; that under said contracts, all indebtedness which said firm would have against any person or corporation would be owned sixty-four (64) per cent. by this plaintiff and thirty-six (36) per cent. by said

743 Albert Steinfeld; and that, in consequence thereof, any loss which should be sustained by reason of the non-payment of any said indebtedness would be sustained, sixty-four (64) per cent. by this plaintiff and thirty-six (36) per cent. by said Albert Steinfeld, and such was the condition at all times up to and including the commencement of this action; that this plaintiff, at all said times, was a resident of the city of New York, State of New York, and said Albert Steinfeld was a resident of the City of Tucson, County of Pima, Territory of Arizona, and that during all of said times said Albert Steinfeld was the general manager of the said business of L. Zeckendorf & Company, in actual and active control of its business and its business affairs in said Territory, and employed and discharged all of its help and gave and extended all credits and determined its business policy in all matters and things in said Territory of Arizona and in connection with its business therein; that for some time prior to the 14th day of January, 1899, William and Julia Zeckendorf were the owners of what is known as

744 the Mammoth, or the Old Boot mine, being one of the mines described in Schedule A, hereto attached; that the legal title to said mine stood in the name of said Albert Steinfeld, and said Albert Steinfeld held the same as trustee for said William and Julia Zeckendorf; that for some time prior to said 14th day of January, 1899, one Carl Neilsen had a working contract on said mine, executed by said Albert Steinfeld as the ostensible owner thereof, but for the real use and benefit of said William and Julia Zeckendorf, under and by virtue of which said Neilsen was to have the right to operate said mine and to take the ores therefrom and to pay to said Steinfeld, for the use and benefit of said William and Julia Zeckendorf, certain royalties on all ore extracted from said mine; that during the operation of said mine, said Albert Steinfeld as the manager of said L. Zeckendorf and Company, and in actual control of the business of said company, advanced and extended to said Carl Neilsen certain credits, and sold to him on credit large amounts of merchandise, resulting in said Carl Neilsen, on and prior to the 14th day of January, 1899, becoming indebted to said L. Zeckendorf and Company in a large sum of money.

745 That defendant, J. N. Curtis, during the time herein last above mentioned, was in the employ of said L. Zeckendorf and Company and in charge of its mines and mining properties, and at all said times took active personal charge of its mines and

mining properties and attended to the direction of same and to the sales thereof; and received as his compensation for such work certain pay for his time and certain commission on sales of mines might be made by him or through or under his influence or by his help and assistance; that on or about the 14th day of January, 1899, in order to protect said indebtedness so owing to said L. Zeckendorf and Company by said Carl Neilsen, said Albert Steinfeld caused the Neilsen Mining and Smelting Company to be incorporated, under the laws of the Territory of Arizona, the name of said Neilsen Mining and Smelting Company being thereafter changed to the Silver Bell Copper Company, and being the same corporation herein sued as a defendant in this action, under the name of the Silver Bell Copper Company; that at the same time and as a part of the same general transaction, said Albert Steinfeld caused to

746 be conveyed to said Neilsen Mining and Smelting Company the said Mammoth, or Old Boot mine, for an agreed price of twenty-five thousand (\$25,000.00) dollars, to be paid to said William and Julia Zeckendorf in installments of twenty-five hundred (\$2500.00) dollars, to be paid each three months, and thereupon said Carl Neilsen transferred to said Neilsen Mining and Smelting Company his working contract on said mine above mentioned and said Neilsen Mining and Smelting Company assumed said indebtedness owing to said L. Zeckendorf and Company, and the same was then charged on the books of said L. Zeckendorf and Company by the order and under the direction of said Albert Steinfeld, as general manager to the said Neilsen Mining and Smelting Company, and the same was thereafter carried on the books of L. Zeckendorf and Company in the name of Neilsen Mining and Smelting Company; and at the same time L. Zeckendorf and Company, by said Albert Steinfeld, its general manager aforesaid, released said

747 Carl Neilsen from all personal obligation on said indebtedness; that thereupon the stock of the said Neilsen Mining and Smelting Company was divided as follows, to-wit: five hundred (500) shares thereof to said L. Zeckendorf and Company, thirty (30) shares thereof in the name of said L. Zeckendorf and Company for the benefit of said William and Julia Zeckendorf and in trust for them, one hundred and seventy (170) shares to said J. N. Curtis, three hundred (300) shares to said Carl Neilsen; said one hundred and seventy shares to said J. N. Curtis being given to him by said Albert Steinfeld, as the manager of said L. Zeckendorf and Company, as compensation for his services in connection with said transfer, and said three hundred shares being issued to said Carl Neilsen in consideration of the relinquishment by him of his said contract for working on said mine; that the directors of said company thereupon elected were said defendant, J. N. Curtis, said Carl Neilsen and defendant, R. K. Shelton; that said Carl Neilsen was elected the nominal general manager and superintendent of said company and J. N. Curtis the president and said R. K. Shelton elected the secretary of said company, but at all times there-

748 after said Albert Steinfeld assumed to be the general manager of said company and assumed the power of directing

its affairs and of controlling all of its actions, and said assumption of power on the part of the said Albert Steinfeld was assented to and acknowledged by the said J. N. Curtis, Carl Neilsen and R. K. Shelton, and said Steinfeld at all times thereafter was the actual manager and managing agent of said company and of its affairs.

That thereupon said Neilsen Mining and Smelting Company entered upon the work of the development of said Mammoth or Old Boot mine, said Carl Neilsen, as superintendent, being in actual charge thereof; and under said operation large ore bodies in said mine were developed and were extended to within a short distance of the southern boundary line thereof, being the dividing line between said mine and the Prospector mine, one of the mines known as the English group of mines hereinafter referred to, and that it thereupon became evident that said ore bodies then developed under-

749 Prospector mine and other of said English group of mines, the said facts being ascertainable alone from an examination and inspection of the underground workings of said Mammoth or Old Boot mine; that at about the same time the said J. N. Curtis on the order and direction of said Albert Steinfeld took up in his own name other mines around and surrounding said Old Boot mine, all for the use and benefit of said Neilsen Mining and Smelting Company, or Silver Bell Copper Company, and the same were carried by said J. N. Curtis thereafter in his own name, but as the property of and for the use and benefit of said Silver Bell Copper Company, said mines being included in the mines sold to the Imperial Copper Company and being part of the mines described in said Schedule Exhibit A, hereto attached;

That during all the times herein mentioned those mines known as the English group of mines, being a part of mines described in Schedule Exhibit A hereto attached, and specially so listed thereon, surrounded said properties of the Silver Bell Copper Com-
750 pany; that the beneficial ownership of said mines was in certain parties resident in England, from which fact the said mines came to be known as the English group of mines; that one Francis and one Volkert claimed that said mines were open to location and had filed locations on the same and were also claiming title thereto; that this condition of ownership by said English parties continued through the year 1899 and through the year 1900, up to the time of the purchase by Albert Steinfeld, hereinafter mentioned, of what is known as the English title thereto; that the Francis and Volkert claims to said mines were initiated on or about the first day of January, 1900; that said Mammoth or Old Boot mine, during the fall of the year 1899 and up to the time of the closing of said mine in the spring of 1900, was being worked at a profit; and at the time of the closing of said mine, hereinafter mentioned, was yielding a profit of about five hundred dollars (\$500.00) per day, or fifteen thousand dollars (\$15,000.00) per month; that at said time said Neilsen Mining and Smelting Company was heavily indebted to said firm of L. Zeckendorf and Company for moneys which had
751 been advanced by said L. Zeckendorf and Company to said Neilsen Mining and Smelting Company, to enable it to de-

velop and open up said mine and to buy machinery, mills and other property necessary for the working of said mine and the handling of ores taken therefrom, and also for certain goods, wares and merchandise sold by said L. Zeckendorf and Company to said Neilsen Mining and Smelting Company;

That in the fall of 1899, said J. N. Curtis, the president of said Neilsen Mining and Smelting Company, advised and informed said Albert Steinfeld that the developments of said Mammoth mine showed that the underground ore bodies therein would run into said Prospector mine and other mines belonging to said English group of mines, and that said underground workings showed that there was probably great values in said English group of mines; and that at about the same time said Albert Steinfeld became dissatisfied with the management of said Carl Neilsen and with his work as superintendent and general manager of said mine; and thereupon and in the month of January, 1900, said Albert Steinfeld assumed
752 to discharge said Carl Neilsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the board of directors of said company; and at the same time ordered said Mammoth mine to be closed down and all work thereon to be stopped, in order that the English group of mines, so called, and the Francis-Volkert titles thereto might be purchased at a nominal, or small, sum, without the owners thereof obtaining knowledge through the workings of said Mammoth mine and the showing of ore therein that said ore bodies probably did, or would extend into said English group of mines;

That said J. N. Curtis, as the president of said Neilsen Mining and Smelting Company, prior to said time, had frequently advised and notified said Albert Steinfeld that it was very desirable in fact necessary that said English group of mines, so called, should be purchased for said Neilsen Mining and Smelting Company in order that all of the mines and mining claims surrounding said Mammoth mine should constitute one group and in order that the whole thereof
753 might be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth mine, soon ascertain that the ore bodies therein probably extended into said English group of mines, and because of the fact that all purchasers of large mining properties desired to control all claims immediately surrounding any developed mine or mines; that said Albert Steinfeld, before ordering said mine to be closed and work thereon to be stopped, visited said mine and examined the same and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in said mine and their tendencies, as above alleged, and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Schedule A, hereto attached, could or might be sold as one group and one property; that said Albert Steinfeld acquired said information only and solely because of the fact that he was acknowledged and conceded to be the actual manager of said Neilsen Mining and Smelting Company, and be-

cause of his assumption of such power and of such possession;
754 and that he acquired said knowledge and information solely from said J. N. Curtis, the president of the said Neilsen Mining and Smelting Company, and from his examination of said mine made by him as such assumed and acknowledged actual manager of said company; that said Neilsen being discharged as said superintendent and manager, the personal control of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the president of said Neilsen Mining and Smelting Company, and that said J. N. Curtis, as such president of said company, continued to advise said Steinfeld of the necessity of purchasing said adjoining properties and of acquiring the title thereof, in order that the company might benefit by the ownership thereof, both by way of acquiring the ore bodies that might run into said other adjoining mines and by virtue of its having one entire strip of mines to sell as one property for one entire price; that, as above alleged, at the time of the closing down of said mines, the said mines were paying a profit of not less than five hundred (\$500.00) dollars per day, or fifteen thousand (\$15,000.00) dollars per month, and said mines were closed down by said
755 Albert Steinfeld solely and exclusively, as above alleged, for the purpose of enabling him (as the agent or representative of the Neilsen Mining and Smelting Company) to acquire said English group of mines and the Volker and Francis titles thereto, and of getting rid of said Carl Neilsen;

That thereupon, and on or about the 29th day of June, 1900, said Albert Steinfeld, as such agent or representative of and for the benefit of the said Neilsen Mining & Smelting Company, purchased from the said Carl Neilsen the said three hundred (300) shares of stock belonging to said Carl Neilsen, and purchased from said Carl Neilsen and one Lewis two certain mines and all mines and mining claims that said Carl Neilsen might have in the mining district in which were located said Mammoth, or Old Boot mine, said mining district being known as the Silver Bell Mining District that the purchase price he paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2,000.00) dollars cash, and the sum of ten thousand (\$10,-
756 000.00) dollars, to be paid out of the proceeds of the working of said Old Boot, or Mammoth mine, or the proceeds of the sale of the mine, in the event the same should be sold, before said sum should be paid out of the proceeds derived from the sale of said mine; that said contract between said Steinfeld and said Neilsen was prepared on the direction of said Steinfeld by one S. M. Franklin, the attorney for said Neilsen Mining and Smelting Company, and the same, on the direction of the said Albert Steinfeld, was signed by himself individually and by said Neilsen Mining and Smelting Company, and in and by which contract the said Albert Steinfeld and the said Neilsen Mining and Smelting Company contracted and agreed to pay said Carl Neilsen said further sum of ten thousand dollars out of the proceeds of the working of said mine, or, in the event the same was not thus paid before sale, then out of the proceeds of the sale of said mine. And said sum of ten thousand

dollars was paid by said Steinfeld to Mary Neilsen, the successor of Carl Neilsen and one of the parties to said contract, out of the proceeds of the sale of said mine derived from said Imperial
757 Copper Company, as herein alleged; that upon the closing down of said mine and in the spring of 1900, said Albert Steinfeld, as such agent or representative of and for the benefit of the said Neilsen Mining and Smelting Company, purchased from said Francis and said Volkert their interest in said entire group of mines, paying them therefor the sum of twenty-five hundred (\$2500.00) dollars, and entering into a further contract with said parties to pay to them the further sum of twelve thousand five hundred dollars (\$12,500.00) out of the proceeds of the sales of said mines, in the event the same were sold, and which said sum of twelve thousand five hundred dollars was paid by said Albert Steinfeld to said Francis and Volkert out of the proceeds received from said Imperial Copper Company for the sale of said mines described in Schedule A hereto attached; that thereupon said Albert Steinfeld proceeded to England and there consummated the purchase of the titles to said English group of mines, including the purchase of the equitable, as well as the legal title thereto, paying therefor the sum of
758 five thousand (\$5,000.00) dollars; that said sum of five thousand dollars, so paid for said English group of mines, and said sum of twenty-five hundred dollars, so paid to said Francis and Volkert, were amounts much less than said mines could possibly have been purchased for, if the owners of said English group of mines had become possessed of the knowledge which said Albert Steinfeld had acquired, as above alleged, of the tendency of the ore bodies in said Mammoth, or Old Boot mine, and that said Albert Steinfeld was enabled to purchase said mines at said reduced price solely and wholly because of the fact that said mines were shut down and said workings thereon stopped, to the great loss and damage of said Neilsen Mining and Smelting Company; that after acquiring said titles to said mines, said Albert Steinfeld directed that the said Mammoth or Old Boot mine be again put in operation and again worked, which said direction was in the fall of the year 1900; that by said time the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot mine were very much less than at the time said mine was closed
759 down by said Steinfeld, as above alleged, and, in consequence thereof, said Neilsen Mining and Smelting Company sustained a great damage, in fact, a damage far in excess of the price paid by said Steinfeld for said mines.

That immediately upon acquiring said two mines from said Neilsen and Lewis and said English group of mines, said Steinfeld turned same over to the possession of the said Neilsen Mining and Smelting Company, prior to the month of December, 1900, and said Neilsen Mining and Smelting Company thereupon assumed the possession thereof and the control thereof and at all times thereafter, by the consent and with the knowledge of said Albert Steinfeld, treated said mines as its own, and in the month of December, 1900, said Neilsen Mining and Smelting Company performed the

annual assessment work on said mines required by the laws of the United States to be performed on all mines for the year 1900, and thereafter performed said assessment work on said mines for the year 1901 and the year 1902, all expenses of said assessment work being paid by said Neilsen Mining and Smelting Company, by and on the direction of said Albert Steinfeld, the money therefor being furnished and loaned to said Neilsen Mining and Smelting Company by said L. Zeckendorf & Company, by said Albert Steinfeld, the manager thereof, the same being charged on the books of said L. Zeckendorf & Company by and on the direction of said Albert Steinfeld, as its manager, to said Neilsen Mining and Smelting Company, the said indebtedness was thereafter paid out of the proceeds of said sale to said Imperial Copper Company; that all development work that was done on any or all of said so-called English group of mines was done by said Silver Bell Copper Company, by and with the knowledge of said Albert Steinfeld and on his direction and by and with money furnished and loaned to said Silver Bell Copper Company by said L. Zeckendorf & Company, by said Albert Steinfeld, as its manager, the same being charged on the books of said L. Zeckendorf & Company to said Silver Bell Copper Company, and the same was thereafter paid by said Silver Bell Copper Company to said L. Zeckendorf & Company by said Albert Steinfeld, as Treasurer of said Silver Bell Copper Company, out of the proceeds of the sale of said mines to said Imperial Copper Company.

That said J. N. Curtis, as president of said Silver Bell Copper Company, upon said mines being turned over, as aforesaid, to said Silver Bell Copper Company, prepared various maps for and under the direction of said Albert Steinfeld, showing all of said mines described in said Schedule A, hereto attached, as one property and one entire group of mines and as the mines and properties of said Silver Bell Copper Company, and said J. N. Curtis, as the president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, prepared various reports of all the properties of said Silver Bell Copper Company and included in said reports the said English group of mines as being properties of said Silver Bell Copper Company, and that said J. N. Curtis, as the president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, credited said Albert Steinfeld with all the money which he had paid to said Volkert, to said Neilsen and to the holders of said English titles, and credited him with one per cent per month interest on such sums, and said credit in favor of said Albert Steinfeld on the books of said Silver Bell Copper Company was made by and on the direction of said Albert Steinfeld; that included in said credit said Albert Steinfeld caused said Silver Bell Copper Company to credit him with all expenses of said trip to England, including the expenses of his son and the expenses of himself and his son to various places on the continent of Europe, taken at the same time and in no way connected with said trip to England for the purpose of purchasing said mines, and caused himself to be credited with all moneys paid by him, or on account of or

in any manner connected with the purchase of said mines; that all said sums of money, with interest thereon from the dates of payments thereof, at one per cent per month, on the 20th of May, 1903, amounted to the sum of eighteen thousand one hundred and seventeen (\$18,117.00) dollars, and is the eighteen thousand one hundred and seventeen dollars said Albert Steinfeld paid to himself out of the proceeds of the sales of said mines to said Imperial Copper Company; that said credit, or charge, on the books of said Silver Bell Copper Company, so made by said J. N. Curtis, was
763 made in the month of May, 1901, on the written order and direction of said Albert Steinfeld and by writing signed by him, in and by which he stated that said moneys, so paid by him, were paid as an advance to and for the use and benefit of said Silver Bell Copper Company; that thereafter and in the month of July, 1901, said J. N. Curtis, president of said Silver Bell Copper Company, with S. M. Franklin, the attorney of said Silver Bell Copper Company, went to said Albert Steinfeld and stated to him that they understood he was claiming said English group of mines as his own, and thereupon he, said Franklin and said Curtis, as the attorney and president representing said Silver Bell Copper Company, stated to said Steinfeld that he held said properties in trust for said Silver Bell Copper Company, and that he could not hold the same for himself, and said Franklin, the attorney for said Silver Bell Copper Company, then stated to said Steinfeld that he would be obliged to continue to hold said properties in such form until his actions were either ratified or disaffirmed by a board of directors not
764 controlled by him, or at a stockholders' meeting, when all of the stock was voted by persons competent to vote thereat, and who were not controlled by said Albert Steinfeld, and said Albert Steinfeld thereupon, and on said demand and statement being made by said Franklin and said Curtis, agreed to the fact that he held said properties in trust for said Silver Bell Copper Company, and that all he desired was a repayment to him of the moneys which he had advanced and which he has theretofore caused said Curtis to credit to him on the books of said Silver Bell Copper Company, and then and there agreed that he would continue to hold said properties in trust for said Silver Bell Copper Company until his action in purchasing the same was disaffirmed or affirmed by the stockholders of said Silver Bell Copper Company, at which all of the stock should be voted by persons competent to vote the same; that no such meeting was ever held and the action of said Steinfeld was never disaffirmed; on the contrary, the same was affirmed and ratified; that in the month of June, 1903, while said Steinfeld held said four promissory notes and a portion of said one hundred and fifteen thousand (\$115,000.00) dollars, first installment, cash
765 payment, in his hands as the treasurer of said Silver Bell Copper Company, said Steinfeld stated in a letter addressed to this plaintiff that he had always held said properties in trust for said Silver Bell Copper Company, and that he had advanced said money for the use and benefit of said company, and that he had

advanced and paid to said Neilsen said two thousand dollars for said company.

That said Steinfeld, at divers and different times during the year 1900 before purchasing said English group of mines, by letters to this plaintiff and to said J. N. Curtis, the president of said Silver Bell Copper Company, stated, in effect, that he was going to purchase the same for the Neilsen Mining and Smelting Company, or the Silver Bell Copper Company, or for its use and benefit; that in the month of March, 1901, said Albert Steinfeld called upon said J. N. Curtis to prepare a written report of "the mines and mining properties of the Silver Bell Copper Company," and that on the 24th day of March, 1901, and pursuant to said request, said J. N. Curtis, as the president of said Silver Bell Copper Company, delivered to said Albert Steinfeld a written report and statement particularly describing the properties of the Silver Bell Copper Company, in which written report he, the said J. N. Curtis, included by description all of the said English group of mines; that said Albert Steinfeld, in said month of March and in the month of April, 1901, circulated said written report and delivered copies thereof to various and different people and to this plaintiff, as being a correct report of the mines and mining properties of said Silver Bell Copper Mine; and that thereafter and at various and different times said Albert Steinfeld furnished to this plaintiff written reports of the properties of said Silver Bell Copper Company; and that the three hundred shares of stock purchased by said Albert Steinfeld, as in this amended complaint alleged, from said Carl Neilsen, as trustee, was always held by him as trustee for the use and benefit of said Silver Bell Copper Company; and

That at various and divers times during the years 1901, 1902, and the spring of 1903, said Albert Steinfeld has given options on all of said mines described in said Schedule Exhibit A, hereto attached, for one entire purchase price, said price being named in various sums, with no suggestion to any officer or member of said Silver Bell Copper Company that any part or portion of said price other than said sum of eighteen thousand one hundred and seventeen dollars, was to come to him, said Albert Steinfeld, except as a dividend on whatever stock he might own in said Silver Bell Copper Company; and that at no time was there ever a suggestion on his part that there was to be any division of any of said purchase price; that during all said time said J. N. Curtis, as the president of said Silver Bell Copper Company, frequently notified said Albert Steinfeld that said Old Boot Mine, or Mammoth Mine, was itself worth a sum far in excess of the sum of five hundred and fifteen thousand dollars; in fact, said J. N. Curtis, as president of the said Silver Bell Copper Company, before the purchase of said English group of mines, notified said Albert Steinfeld that the said Old Boot, or Mammoth mine, and the other properties belonging to said Silver Bell Copper Company were worth the sum of seven hundred and fifty thousand (\$750,000.00) dollars; that in the month of April, 1903, said Albert Steinfeld without consultation with any officer of the Silver Bell Copper Company, fixed the price of five hundred and fifteen thousand dollars on said entire group of

mines and all said properties, including all mining properties belonging to said Silver Bell Copper Company, and including all mines and properties standing in the name of said Albert Steinfeld, or of said Mammoth Copper Company, in said Silver Bell Mining District, which, in addition to the mines standing in the name of said Silver Bell Copper Company, would include the mines standing in the name of said J. N. Curtis, and said English group of mines standing in the name of said Albert Steinfeld, or said Mammoth Copper Company, and said two mines so purchased from said Neilsen and Lewis, standing in the name of said Albert Steinfeld; that said purchase price of five hundred and fifteen thousand dollars for all of said properties was fixed by Albert Steinfeld without any suggestion on his part that any part or portion thereof was claimed, or would be claimed, by him, except the said sums so expended by him for the purchase of said mines, and which he had caused to be charged to said Silver Bell Copper Company as advances made to or for it and its use

769 and benefit, and on which he was charging said Silver Bell Copper Company interest; that on the 13th day of May, 1903, said Albert Steinfeld reported to the board of directors of said Silver Bell Copper Company, he being one of said board, that he had given an option to one G. A. Beaton on all of the company's property, for the purchase price of five hundred and fifteen thousand dollars, and requested that his action in so doing be confirmed, and thereupon and upon the request of said Albert Steinfeld, he voting therefor, his action in giving said option for said purchase price was confirmed; that the option to said Beaton was taken by him for said Imperial Copper Company and the sale thereafter consummated to the Imperial Copper Company to all the properties described in said Schedule A, hereto attached, was under and by virtue of said option and for the purchase price of five hundred and fifteen thousand dollars named therein; that said sale was consummated on the 20th day of May, 1903; that negotiations of and concerning said sale were continuous from the time of the giving of said option to said

770 Beaton down to and including the payment of the first installment of the purchase price to said Albert Steinfeld as the treasurer of the said Silver Bell Copper Company and the delivery to him of the four promissory notes herein in this amended complaint mentioned, all being paid and delivered to him as the treasurer of the Silver Bell Copper Company, as and for the purchase price of all of the properties described in said Schedule A, hereto attached, and said first installment of cash and four promissory notes were received by said Albert Steinfeld as the treasurer of said Silver Bell Copper Company, and as its property; that said Albert Steinfeld personally conducted said negotiations, by and on behalf of said Silver Bell Copper Company, with said Imperial Copper Company and said Beaton and the attorneys of said Imperial Copper Company, and caused S. M. Franklin, the attorney for said Silver Bell Copper Company, to take part in said negotiations and to assist in the preparation of all contracts and papers, and to do other work in connection with said sale, said S. M. Franklin during all said negotiations acting as the attorney of said Silver Bell Copper Company; that after the consummation of said sale and after

the deed of said Silver Bell Copper Company to said mines had been executed, and after all papers had been executed and delivered to said Imperial Copper Company that were delivered to it in connection with said deal, and after said Imperial Copper Company had paid to said Albert Steinfeld, as the treasurer of said Silver Bell Copper Company, the first installment cash payment on said purchase price, and had delivered to him the four promissory notes making up the balance of said purchase price, the directors of said Silver Bell Copper Company adopted and caused to be spread upon its minutes, under date of said May 20th, 1903, the following resolutions, to-wit:

"Present: J. N. Curtis, president; Albert Steinfeld, director; R. K. Shelton, director.

"The president reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all mining claims of this company in the Silver Bell Mining District, Pima County, Arizona; and all the
772 plant and personal property used therewith also all the machinery, plant and personal property used therewith; also all of the mining claims and personal property used therewith of the Mammoth Copper Company, as well as certain other mining claims or interests therein which stand in the name of Albert Steinfeld and in the individual name of the president, and to pay therefor the sum of \$515,000, as follows: The sum of \$115,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, treasurer, and the balance, \$400,000, in four equal installments of \$100,000 each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent. per annum; and for which deferred payment said company executed to this company its four promissory notes, which are also in the hands of the treasurer.

"He further reported that the necessary deeds and agreements had been executed by the president and secretary of this company and amongst others a guarantee agreement which guarantee agreement
773 was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld individually. The said agreements were read and considered.

"He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

"He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company, had again submitted for acceptance the proposition which he had heretofore submitted in writing on July 15, 1901, with the modifications, however, that this company shall pay to him forthwith in cash the sums of money, which in said proposition were required to be paid on October 15, 1901, to-wit: The sum of \$15,192.45 and also shall forthwith pay in cash, interest thereon from October 15th, 1901, to this date, at the rate of 1 per cent per month, amounting to \$2,924.55, making a total of \$18,117.00, and that this company shall also as-

sume and pay all obligations which he, said Steinfeld, had incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company and
 774 keep him free and harmless from any and all expenses and loss which may arise by reason of any claim or asserted claims, of any person whatsoever, for or on account of or arising out of or connected with present sale and negotiations of any past negotiation or transaction in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy the commissions which he, said Steinfeld, agreed to pay to said Murphy, to-wit: the sum of \$25,000, said agreement being made for and on behalf of this company and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one J. M. Burnett for commission.

"Also that this company shall indemnify him against loss, damage and expense, by reason of his having guaranteed the titles to the mining claims sold or agreed to be sold to said Imperial Copper Company, as is set forth in the guarantee agreement heretofore submitted to this meeting.

"The president also stated that it was necessary to adjust with the Mammoth Copper Company the disposition that was to be
 775 made of the purchase money upon the sale.

"He then submitted the agreement between this company, the said Mammoth Copper Company, and Albert Steinfeld, on this point, and also covering the matter of guarantee."

After a full consideration the following resolutions were unanimously adopted, to-wit:

"Resolved, That all of the acts of the president and secretary of this corporation, and all papers, agreements and deeds signed by them for or on behalf of this corporation in the matter of the negotiations and sale by this company's property to the Imperial Copper Company, be, and the same hereby are, ratified, approved, and confirmed.

"Resolved, That the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he, said Steinfeld, be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen dollars (\$18,117.00) and out of the first moneys received by this company on the promissory notes of the Imperial Copper Company, he, said Steinfeld, as
 776 treasurer of this company, shall retain sufficient moneys to pay the amount necessary to be paid to Margaret Francis and Julius H. Veldert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Neilsen (he being now deceased) and to Mary Neilsen, the amount necessary to be paid under the agreement with said Neilsens aforesaid; and, when said amounts respectively become due, to pay the same to the parties entitled thereto.

"Resolved, That the president and secretary of this corporation be, and they are hereby authorized, empowered and directed, in such manner or form as they deem necessary or proper, to indemnify said Steinfeld against all loss, damage and expense that may arise

to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper Company and that he, and they hereby are authorized, empowered and directed to do or cause to be done all things, and to execute all papers, documents or other writings, which they deem necessary in the premises.

777 "Resolved, That Albert Steinfeld, as treasurer of this company, be and he is hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

"Resolved, That the agreement this day made by the president and secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be, and the same is hereby ratified, approved and confirmed."

That said Albert Steinfeld was present and voted at said meeting and signed the minutes thereof as a director.

IV.

"That on and prior to the 20th day of May, 1903, and at the time of the making of the sales by the said Silver Bell Copper Company, hereinafter alleged and set out, said Silver Bell Copper Company was the owner of certain properties in the Silver Bell Mining District, County of Pima, Territory of Arizona, listed and scheduled in

Exhibit A hereto attached; that prior to the said 20th day of 778 May, 1903, said Albert Steinfeld, in his own name and in the name of the said Mammoth Copper Company, had purchased certain of the said properties listed and scheduled in said Exhibit A, the same being purchased, however, in trust for and for the use and benefit of said defendant, Silver Bell Copper Company.

That said Steinfeld had expended in the purchase of said properties and of the said 300 shares of stock from said Carl Neilsen a certain sum of money, which, with interest thereon, from the date of the expenditure to the 20th day of May, 1903, at the rate of one per cent per month, would amount, on the said 20th day of May, 1903, to the sum of \$18,117.00; that prior to said 20th day of May, 1903, the said Steinfeld in his own name and in the name of said Mammoth Copper Company, had offered to said Silver Bell Copper Company, in writing, that said properties would be conveyed to said Silver Bell Copper Company, upon said Steinfeld being paid back the amount of such expenditure, with interest thereon, as aforesaid, the said Silver Bell Copper Company, in consideration thereof, to 779 pay for the assessment work to be done on said properties;

that said Silver Bell Copper Company, after the receipt of said offer, did pay all the annual assessment work required to be done on said properties, and from time to time expended large sums of money in the development of said properties so standing in the name of said Albert Steinfeld and said Mammoth Copper Company the said Silver Bell Copper Company at all times after the

purchase of said properties by said Steinfeld as aforesaid, being in possession of and in the use and occupancy of the said properties.

That on said 20th day of May, 1903, and prior to the making of the sale hereinafter set out and alleged, said Albert Steinfeld (the being the owner of all of the stock of the said Mammoth Copper Company) presented to the said defendant, the said Silver Bell Copper Company, the renewal of said offer to transfer said properties so standing in his name and in the name of the said Mammoth Copper Company, upon his (the said Steinfeld) being paid the sum of \$18,117.00, which said offer on the part of said Steinfeld, by resolution

of the board of directors of said Silver Bell Copper Company, entered in the minutes of said corporation, was then and there accepted by said Silver Bell Copper Company, said Steinfeld as a member of said board voting in favor of the adoption of said resolution and of the acceptance of said offer and tender; that no separate transfer or conveyance was made by said Albert Steinfeld or said Mammoth Copper Company of any of said properties to said Silver Bell Copper Company, but on said 20th day of May, 1903, the said Silver Bell Copper Company sold all of the properties listed and described in said Schedule and Exhibit A, to the Imperial Copper Company, for the agreed price of \$515,000.00 gold coin of the United States, payable as hereinafter stated, the said Albert Steinfeld and the said Mammoth Copper Company joined with the said Silver Bell Copper Company in the deed of conveyance of said properties to said Imperial Copper Company; that said Albert Steinfeld and Mammoth Copper Company joined in said deed simply and for the purpose that the legal title to any of said properties which might be standing in the name of both or either of said parties, should be conveyed and transferred to said Imperial

Copper Company, it being then and there agreed, however, by and between the said Silver Bell Copper Company, the said Imperial Copper Company and the said Steinfeld that the said \$515,000.00 purchase price of said properties was the property of the Silver Bell Copper Company, and that all cash and notes representing said purchase price or installments thereof, as hereinafter stated, were the property of said Silver Bell Copper Company; that the said purchase price of \$515,000.00 under and by virtue of said contract with the said Imperial Copper Company, became payable as follows: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,000.00 in four equal payments of \$100,000.00 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the Silver Bell Copper Company, each of said notes being dated the 20th day of May, 1903, bearing interest from said date to the date of the payments thereof, at the rate of six (6) per cent per annum;

that said sum of \$115,000.00 in cash was paid by said Imperial Copper Company to said Albert Steinfeld, as the treasurer of and for the said Silver Bell Copper Company; that said Albert Steinfeld, out of said sum, paid to himself the said sum of

\$18,117.00, the amount, as heretofore stated, of the expenditures theretofore made by him in the acquiring of certain of said properties and said stock, with the interest thereon from the date of payment thereof by said Steinfeld to the said 20th day of May, 1903, at the rate of one per cent per month, that after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company paid two of said promissory notes, paying the principals thereof with the interest at the said rate of six per cent, per annum on said principal up to the respective dates of payment, making a total of cash paid to the said Silver Bell Copper Company prior to January 1, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said Exhibit A, of the sum of \$319,487.50; that the said sums of money,

aggregating the said sum of \$319,487.50, were received by 783 the said Silver Bell Copper Company from said Imperial Copper Company as and for the first cash payment, and as the payments of the two promissory notes first falling due on the said purchase price of said sale so made by said Silver Bell Copper Company to said Imperial Copper Company, and all of the said money not now on hand and in the possession of said Silver Bell Copper Company was paid out and disbursed by the said Silver Bell Copper Company under the direction, management and control of the said Albert Steinfeld or by the said Albert Steinfeld personally while he held in his possession, as the treasurer of said company, the first installment cash payment above alleged and set out, which said expenditures so made by said Albert Steinfeld as aforesaid, were not made on any prior order of the board of directors of said Silver Bell Copper Company, though all of said payments were thereafter ratified except as herein stated, by said board upon said Steinfeld submitting to said board the statement in writing of the said expenditures so made by him. That of said sum there was paid out for and on account of certain debts and contracts of the Silver Bell Copper

784 Company, a total of about \$118,000.00, and to the said Albert Steinfeld as aforesaid the said sum of \$18,117.00, which last mentioned sum the said Albert Steinfeld personally and individually, and for his own use and benefit, received of and from the said Silver Bell Copper Company, as a full payment of all sums whatsoever that might be due or owing from said Silver Bell Copper Company for or on account of any or all interests that the said Steinfeld and the said Mammoth Copper Company, or both, had or might have in or to any of the said properties, so listed and scheduled in said Exhibit A, and so sold and conveyed to said Imperial Copper Company, and of the \$2,000.00 so advanced for said Silver Bell Copper Company to said Carl Neilsen and said Lewis, as aforesaid, and in accepting said sum of \$18,117.00 as aforesaid, said Steinfeld, for himself and for said Mammoth Copper Company, thereby released and relinquished to the said Silver Bell Copper Company any and all interests either or both might have or did have in or to any of said properties so listed and described in said schedule Exhibit A, and satisfied and paid all indebtedness that was owing to 785 him, said Steinfeld, for moneys advanced to and for said Silver Bell Copper Company, as herein alleged.

V.

That after the completion of the sale aforesaid and after the receipt by said Silver Bell Copper Company of said sum of \$115,000.00, and interest, the said Albert Steinfeld, Mammoth Copper Company and Silver Bell Copper Company, on or before the 26th day of May, 1903, and not earlier than May 25th, 1903, executed a memorandum in writing, dated May 20th, 1903, denominated an agreement, in and by which the said parties recited, over their own signature, that all of the proceeds of said sale, including the said notes and the said cash, were the property of the said Silver Bell Copper Company, and the said Albert Steinfeld and the said Mammoth Copper Company had no interest whatever therein; that said memorandum in writing purported to give to said Albert Steinfeld the sole custody of said money and notes and of the proceeds

thereof for one year thereafter; that a copy of the said memorandum so signed by the said parties was spread upon the minutes of a meeting of the said board of directors of said defendant corporation, the Silver Bell Copper Company, held after the 24th day of May, 1903, and on or about the 26th day of May, 1903, the minutes of said meeting, however, being incorrectly dated the 20th day of May, 1903, in order thereby to indicate that said meeting was held on said date, when in truth and in fact it was not so held, as hereinabove alleged. That said Albert Steinfeld acted as director at said meeting and controlled, directed and managed the other two directors acting with him.

That under date of the 26th day of December, 1903, but whether on said date or at a latter date this plaintiff does not know, the said defendants, Shelton, Steinfeld and Curtis, purported to hold a meeting as a board of directors of said Silver Bell Copper Company, and to act as directors of the said defendant corporation, and at such meeting and so acting purported to pass a resolution wherein and

whereby the said Silver Bell Copper Company purported to rescind the said memorandum or so called agreement, dated

May 20th, 1903, a copy of which resolution was spread upon the minutes of said meetings aforesaid, but as this plaintiff is informed and believes and so alleges, said board did not attempt to and did not rescind any other of the transactions of said meeting, held on or about May 20th, 1903, entered in the minute book as being held on May 20th, 1903, and particularly did not purport to or attempt to and did not rescind the transaction by which the defendant, the Silver Bell Copper Company, repaid to and reimbursed the said Albert Steinfeld, and the said Albert Steinfeld received from the said company, the said sum of \$18,117.00; that any action or purported action on the part of said board of directors, except with reference to the custody of said money and funds, was not consented to by this plaintiff, and this plaintiff has not consented to or ratified the same, and because of the facts in this amended complaint alleged, and particularly because of the fact that neither said Curtis, said Shelton or said Steinfeld, for the reasons herein alleged, was

competent to act as a director of said Silver Bell Copper
788 Company in any transaction or dealing with said Albert
Steinfeld, the same are not binding on said corporation; that
this plaintiff had no knowledge of the action of said board of directors, so taken on the said 26th day of December, 1903, until after the 21st day of January, 1904; and had no knowledge that said board of directors had held or had attempted to hold any meeting on or under said date of December 26th, 1903, until after January 21st, 1904; that prior to any attempted meeting of said board of directors, on said 26th day of December, 1903, a meeting of the stockholders of said company was held, at which this plaintiff was present, at which meeting it was agreed and understood that the contract, in so far only as it affected the custody and control of said money, so entered into under said date of May 20th, 1903, should be rescinded, and that all of the money and property received from the sales of said Silver Bell Copper Company and so in the hands of said Albert Steinfeld should be turned over by him to J. N. Curtis, who had, in the meantime, been elected treasurer as well
789 as president of said Silver Bell Copper Company; and said Albert Steinfeld did thereupon turn said money and said property over to said J. N. Curtis as the treasurer of said Silver Bell Copper Company, and as its property, under and by virtue of the actions taken at said stockholders' meeting, and the same was thereafter held by said J. N. Curtis as such treasurer, as the property and money of said Silver Bell Copper Company, until the wrongful disbursement and payment of the same, as in this amended complaint alleged; that the only matters discussed at said stockholders' meeting was the question of the custody of said money and the holding thereof by said Albert Steinfeld, as an indemnity to him for and on account of his guarantee to said Imperial Copper Company on said 20th day of May, 1903; that at said time and at said stockholders' meeting, Mr. Eugene S. Ives, an attorney at law and representing said Albert Steinfeld as his attorney, was present and presented to said meeting the following resolutions as being
790 resolutions adopted at said meeting held under said date of the 20th day of May, 1903, to-wit:

"Resolved, That the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be and the same is hereby ratified, approved and confirmed."

"Resolved, That the president and secretary of this company be, and they are hereby authorized, empowered, and directed, in such manner or form as they deem necessary or proper, to indemnify the said Albert Steinfeld against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the property so sold or agreed to be sold to the said Imperial Copper Company, and that he and they be hereafter authorized, empowered and directed to do or cause to be done all things and to execute all

papers, documents which they may deem necessary in the premises."

791 That no reference was made in said meeting to any other resolution than said two resolutions above set out; and all discussion and acts taken at said meeting were intended to refer to said resolutions only and not to any other resolution or resolutions adopted or passed at the meeting held under date of May 20th, 1903, as hereinbefore alleged and set out.

And that at said stockholders' meeting it was voted to rescind said resolutions above set out and said contract of May 20th, 1903, and no other or different contract or resolutions, and if the action taken at said stockholders' meeting had the effect, on its face, of rescinding any other resolutions or any other contract adopted on said 20th day of May, 1903, or under date thereof, particularly the contract entered into by the acceptance of said offer of Albert Steinfeld as to the payment to him of said sum of \$18,117.00 and the payment thereof, such action was a mistake on the part of this plaintiff and was not intended as such, and was a mistake on the part of the other stockholders of said company present at said meeting, and was not intended as such; that thereafter and without further action

792 whatsoever by the said Silver Bell Copper Company, and without any stockholder of the said company other than the said Curtis, Steinfeld and Shelton, having any knowledge whatsoever thereof, or of such intended action, on or about the 16th day of January, 1904, the said Steinfeld, Curtis and Shelton, purporting to act as a board of directors of said corporation, purported to adopt and pass a resolution, and caused the same to be spread upon the minute book of said corporation, wherein and whereby the said parties so acting as aforesaid recited the fact that Albert Steinfeld and the said Mammoth Copper Company claimed that their interests in the properties conveyed as hereinbefore set out, by the said Silver Bell Copper Company to the said Imperial Copper Company, were of greater value than were the interests of the said Silver Bell Copper Company therein, and that the said Albert Steinfeld was the sole and only stockholder of said Mammoth Copper Company, as hereinbefore alleged, and therefore was the practical owner thereof, claimed

793 that they were entitled to more than one-half of the said purchase price of \$515,000.00 so received by the said Silver Bell Copper Company, from the said Imperial Copper Company, and thereupon the said Steinfeld, Curtis and Shelton at said purported meeting and purporting to act as the board of directors of said corporation, and as an act prepared by and for said Albert Steinfeld, and at his request and on his direction, further resolved that the said Silver Bell Copper Company should pay to the said Albert Steinfeld personally and for his own individual use and benefit, one-half of the said cash already received, less one-half of the sum of \$28,000.00, theretofore paid by the said Silver Bell Copper Company as commissions and expenses in connection with the making of said sale, and that the said Silver Bell Copper Company should also, at the same time, deliver or cause to be delivered to the said Albert Steinfeld, one of the two promissory notes belonging to said corporation, still remaining unpaid and still in the hands of the

corporation, and that said Albert Steinfeld should retain as his own the sum of \$25,750.00, being one-half of the sum of \$51,500.00 still in his hands belonging to the said Silver Bell Copper Company, and garnished by one Franklin as its property, that thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company, and as such having in his possession the cash, and under his control the notes hereinafter mentioned, and under no other authority or claimed authority than as hereinbefore set out, paid to the said Albert Steinfeld of the said funds of the said Silver Bell Copper Company then on hand, the sum of \$145,743.75, in cash (the same being one-half of said sum of \$319,487.50, less the said sum of \$28,000.00) and delivered or caused to be delivered to said Albert Steinfeld one of said notes, and which said funds and note said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company.

The said note so delivered to said Albert Steinfeld at the time of such delivery was worth the full amount of the principal and interest thereof, viz: \$100,000.00, with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent per annum, and said Steinfeld collected said full sum thereon.

That said Steinfeld also retained the said sum of \$25,750.00 still remaining in his hands as aforesaid, and thereupon converted the same and said sum of \$145,743.75 and said note so delivered to him as aforesaid and the proceeds thereof to his own use and benefit, and not for or to the use or benefit of any other person, firm or corporation, except J. N. Curtis, as hereinafter alleged, and has ever since and does now retain the same, and has not, nor has any part thereof ever been paid back to the Silver Bell Copper Company or returned to it, and nothing whatever on account thereof has ever been paid to said corporation or for it, but the whole remains unpaid; that except as hereinafter specifically alleged, said Albert Steinfeld collected on said note prior to the commencement of this action the sum of \$193,967.00, which, with said sum of \$25,750.00 and said sum of \$145,743.75, makes a total sum of \$275,460.75, and all of which said Albert Steinfeld, before the commencement of this action, had taken, received and used as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use and benefit and not to the use and benefit of any other person, firm or corporation, except as herein specifically alleged and set out.

VI.

That the Board of Directors of the said Silver Bell Copper Company, still acting under the management and still controlled by the said Albert Steinfeld, subsequent to the said 10th day of January, 1904, and prior to the 16th day of January, 1904, caused to be sold the other of the said two promissory notes remaining unpaid, receiving thereon, on account of the principal and interest, a total of \$193,967.00, which said sum was paid into the treasury of the Silver

Bell Copper Company and deposited to its account in the banks of the City of Tucson, Territory of Arizona.

VII.

That on the 20th day of January, 1904, and at the time of the holding of the meeting next hereinafter alleged and set out, there remained on deposit in the hands of the said Silver Bell Copper Company and in the hands of its treasurer, a total of \$111,750.00,

being all that remained of the said sum of \$515,000.00 after
797 the misappropriation and wrongful diversion of the funds and property of the said corporation hereinabove alleged and set out; that thereupon, and on the 20th day of January, 1904, the said above named defendants Steinfeld, Curtis, and Shelton, all acting under the control, management and direction of the said Albert Steinfeld and purporting to act as a board of directors of the said defendant, the Silver Bell Copper Company, passed a resolution wherein and whereby they purported to declare a dividend of \$111.00 per share on the full one thousand shares of the stock of the said Silver Bell Copper Company, including the said three hundred shares of stock hereinabove alleged and referred to standing in the name of said Albert Steinfeld, as trustee, for the benefit and as the property of the said defendant corporation, the Silver Bell Copper Company, and thereupon, and on said 20th day of January, 1904, the said Albert Steinfeld, being solely in control of the said defendant corporation, the Silver Bell Copper Company, and of its

officers and directors, caused said directors of said corporation
798 tion and said Curtis as the treasurer thereof, to pay to him the said sum of \$33,000.00, being \$111.00 per share on said three hundred shares of stock, the property of said Silver Bell Copper Company, as aforesaid, and the said Albert Steinfeld then and there received the said \$33,000.00 and then and there appropriated the same to his own individual use, and not to any use or benefit as security or otherwise of said Silver Bell Copper Company; and thereupon the said Albert Steinfeld caused to be issued to the said R. K. Shelton a check for \$111.00; that as part of the same transaction and under the agreement by which the said Shelton, Steinfeld and Curtis agreed to pass the resolutions declaring the said dividend and the resolutions of January 16th, 1904, it was agreed that there should be paid to the said Curtis the sum of \$111.00 per share on the one hundred and seventy shares standing in his name on the books of the company and thereupon there was paid to the said Curtis the sum of \$18,870.00, which said sum of money the said Curtis received from the said Silver Bell Copper Company and appropriated to his own use;

That the money so paid to the said Curtis and to the said
799 Steinfeld and Shelton as dividends aforesaid, were all paid, as this plaintiff is informed and believes and so alleges, the fact to be, under the agreement and arrangement entered into at the time the said \$145,743.75 and the said note were turned over to the said Albert Steinfeld, as hereinbefore alleged and set out, and this plaintiff alleges on his information and belief, that at the time

it was agreed between the said Steinfeld, Curtis and Shelton that there should be paid to the said Steinfeld the said sum of \$145,743.75, and that there should be turned over to him the said note, it was also agreed that there should also be declared the said dividend so that the said Curtis should receive the said sum of \$18,870.00 and that all of said acts were done under and as a part of one transaction, contract and arrangement, and this plaintiff is further informed and believes and so alleges the fact to be, that the said sum of \$18,870.00 was paid to the said Curtis as consideration to him for his agreeing that the said Steinfeld should be paid the said sums hereinabove set out and should receive the said note; that
 800 plaintiff is informed and believes, and, on such information and belief, alleges the fact to be; that said Steinfeld, out of the proceeds of said promissory note and of said cash so turned over to him, including said sum of \$72,000.00, paid to said Curtis the full share thereof that one hundred and seventy shares of stock bears to seven hundred shares, and that said Curtis, in fact, received from said Steinfeld the full proportion of said cash and notes that he would have received if said money and note had not been so diverted, and paid to said Steinfeld, but had been allowed to remain in the treasury of said Silver Bell Copper Company and disbursed as dividends on all of the stock thereof, and that said Curtis did not give up to said Steinfeld, as would appear from the reading of the record, a sum approximating \$72,000.00 and receive only the sum of \$18,870.00, but that said Curtis received from said Steinfeld the full amount of \$90,000.00, or its equivalent, in consideration of his voting as a director on said 16th day of January, or at the meeting held under said date, for the delivery to said Steinfeld and said Mammoth Copper Company of said cash and said promissory note.

801

VIII.

That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; that this plaintiff, in that regard, has employed as the attorneys for the bringing of this action for the benefit of the said Silver Bell Copper Company, Edwin A. Meserve, of Los Angeles, California, and Messrs. Hereford & Hazzard, of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid, to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action.

That at all of the times above mentioned, when the above named Shelton, Curtis and Steinfeld were purporting to act as directors of the above named corporation, and, as such were *purporting* and attempting to divert from the funds of said corporation the above named sums of money so paid to the said Steinfeld, Shelton and Curtis, and at the times above alleged, when they were purporting to act for the said corporation and to cause said corporation to transfer to the said Steinfeld the said above mentioned promissory note, each and all of said parties well knew that neither the said Steinfeld or the said defendant, Mammoth Copper Company, had any right, title, interest or estate, at any time, in or to any of the said properties described in Schedule "A," hereto annexed, and well knew that neither the said Mammoth Copper Company, nor the said Albert Steinfeld had any right to any of the money or properties of the said Silver Bell Copper Company, except such as the said Albert Steinfeld might have been entitled to by reason of his ownership of the two

803 hundred and fifty shares of stock (being the two hundred and forty-nine shares standing in his name and the one share standing in the name of the said Shelton, as hereinabove set out) and each and all of the said parties well knew that the payment to the said Albert Steinfeld of the said sums of money hereinabove set out and the delivery to him of the said note were in violation of the rights of the said corporation and this plaintiff, as the sole remaining stockholder thereof, and the said acts upon the part of said defendants were done for the purpose of robbing the said corporation and of misappropriating and stealing its funds and for the sole and only purpose of enabling the said Albert Steinfeld to rob and steal from this plaintiff the share of the properties of the said corporation which would, otherwise, be coming to him, as the owner of the said two hundred and fifty shares of stock standing in his name, as hereinabove alleged and set out; that the only properties the said Silver Bell Copper Company ever owned or was ever possessed of, outside of its office books, papers and records, were the properties conveyed

804 by it to the said Imperial Copper Company, as hereinbefore alleged and set out, and that, after the making of said conveyance, the only properties the said Silver Bell Copper Company ever owned were the proceeds of said sale in cash and in notes, as aforesaid, and the said Silver Bell Copper Company now has no other property except that which is shown by the complaint as now left in the treasury of said corporation; that as hereinbefore alleged and set out, the defendants, Shelton, Curtis and Steinfeld, are the directors of the said corporation; that said Curtis and Shelton are under the absolute control of said Steinfeld; that if the moneys belonging to the corporation which have heretofore been illegally diverted, misappropriated and stolen from the said corporation as hereinbefore alleged, by and through the knowing acts of said directors, under the direction and control of the said Steinfeld, as hereinbefore alleged and set out, are again put under the control of said defendant directors all of said

money will still be under the control of said Steinfeld, and the
805 said Steinfeld, so having the control of said money and of the
properties of the said corporation, will again misuse his power
and will again misappropriate and wrongfully divert the funds and
properties of the said corporation and will again convert the same to
his own use in a manner that the same may not be followed by this
plaintiff, or by any other stockholder of the said corporation or other
party who may be interested in the same; that it is inequitable that
said money should be paid by the said defendants again into the cus-
tody and control of the said directors to be again misappropriated and
wrongfully diverted by them; that, to that end, it is, therefore, meet,
equitable and proper that a receiver of the properties, books and
papers of said corporation should be appointed by this court in order
to receive the said money and to properly apply the same to the busi-
ness and debts of said corporation and that the same may be properly
paid out, used and handled as this court, in the exercise of its dis-
cretion, may herein order, decree and determine.

That no part of any of said money so paid to the said
806 Albert Steinfeld or retained by him, as hereinbefore alleged,
and no part of the proceeds of said note so delivered to him,
and no part of the dividends so paid to said Shelton, Curtis and Stein-
feld has ever been paid back to said corporation or for its benefit, but
the whole thereof still remains unpaid.

For a further and separate cause of action against said defendants,
the plaintiff above named alleges:

I.

Plaintiff hereby refers to Paragraph I in the above and foregoing
cause of action set out, to Paragraph II, to Paragraph III, to Para-
graph IV, to Paragraph V, to Paragraph VI, to Paragraph VII, to
Paragraph VIII, and to Paragraph IX, thereof, by this reference
making each and all of the allegations contained in said paragraphs
a part of this cause of action and hereby as a part of his cause of
action re-alleges each and all of said allegations to be true;

II.

That on or about the 29th day of June, 1900, Albert Stein-
807 feld, defendant above named, advanced to and for the benefit
of said Silver Bell Copper Company, the sum of two thousand
(\$2,000.00) dollars, for the purchase by the said Albert Steinfeld, as
the trustee and managing agent of said Silver Bell Copper Company;
and for the use and benefit of said Silver Bell Copper Company the
said three hundred shares of stock issued to and belonging to said
Carl Nielsen, and for the purchase from said Carl Nielsen and one
Lewis of those two certain mines mentioned in this complaint and
known as the Accident and the Black Rock, and at the same time for
said corporation entered into a contract with said Carl Nielsen and his
wife, Mary Nielsen, by which he agreed to pay to said Carl Nielsen
and Mary Nielsen the further sum of ten thousand (\$10,000.00)
dollars, out of the proceeds of the workings of said Old Boot Mine, or

in the event same should be sold before said proceeds should pay the same, then out of the proceeds of the sale thereof, which said contract was entered into by said Silver Bell Copper Company, by its president and by said Albert Steinfeld; that the certificate for said 808 stock was issued to said Albert Steinfeld as trustee and in his name as trustee, the same being held by him as trustee as security for the repayment to him of said sum of two thousand dollars so advanced to said corporation, and for and upon which he thereafter charged said corporation interest, and the security to him that there would be paid to said Mary Neilsen and Carl Neilsen the said sum of ten thousand dollars out of the proceeds of the working of said Old Boot Mine, or out of the proceeds of the sale thereof, in the event said mine should be sold before the proceeds of the working of said mine should pay said sum of \$10,000.00;

That thereupon and thereafter said Albert Steinfeld by writing executed to said Silver Bell Copper Company, signed by him, acknowledged and declared that he held said stock in his name as trustee, as aforesaid, and for the purposes aforesaid:

That thereafter, and on or about the 21st day of May, 1903, and out of the said proceeds of the sale of said mines, said Albert Steinfeld paid to himself the said \$2,000.00 so advanced to and for the use and benefit of said corporation, with interest thereon at the 809 rate of twelve per cent per annum from the date of the advancement thereof on the 29th day of June, 1900, to and including the 20th day of May, 1903, and which said sum so paid to himself was a part of said sum of \$18,117.00 paid to him as heretofore alleged, and thereafter and long prior to the 15th day of January, 1904, there was paid to said Mary Neilsen (the successor of herself and said Carl Neilsen) the said sum of \$10,000.00 out of the proceeds of the sale of said mine, together with all interest that might be due or owing thereon, and that thereupon every and all obligations for which said stock was held by said Albert Steinfeld in trust were satisfied and fully performed, and said trust became and was thereupon fully executed and said three hundred shares of stock thereupon and long prior to said 16th day of January, 1904, became the absolute property of said Silver Bell Copper Company, without any right, title or interest therein whatsoever to said Albert Steinfeld;

That all of the facts hereinabove alleged were at all times known to said defendants, J. N. Curtis and R. K. Shelton;

810 That thereafter and on the 20th day of January, 1904, and under the circumstances and conditions heretofore alleged and set out and in furtherance of the arrangement and conspiracy hereinabove alleged and set out, the said Albert Steinfeld caused the directors of said Silver Bell Copper Company to vote to him a dividend on said three hundred shares of stock of \$111.00 per share, and caused the officers of said company to pay said dividend to him, and on or about said 20th day of January, 1904, under and by virtue of said arrangement and on said dividend there was paid to said Albert Steinfeld the sum of \$33,000.00 as and for such dividend; that said defendants, Shelton and Curtis, and said Albert Steinfeld, as officers of said corporation, well knew that in paying to said Albert Steinfeld

the said dividend they were violating their trust and obligation as directors and officers of said corporation, and that said Albert Steinfeld had no right to the same, and that said \$33,000.00 was the money and property of said Silver Bell Copper Company and should not have been paid to any person whatsoever; that thereupon
811 and before the commencement of this action, said Albert Steinfeld converted said \$33,000.00 to his own use and benefit, and except as heretofore specifically alleged and set out, did not convert said sum of money to the use or benefit of any other person or corporation whatsoever, and said Albert Steinfeld has not, nor has any other person whatsoever paid said \$33,000.00, or any part thereof, to said Silver Bell Copper Company, or to or for its use or benefit, but the whole thereof remains unpaid.

Wherefore, the plaintiff above named prays:

1. That it be adjudged and decreed that the acts of the said board of directors of the defendant, the Silver Bell Copper Company, hereinabove alleged and set out, purporting to authorize and direct the payment to the said Albert Steinfeld and Mammoth Copper Company of the said sum of \$145,743.75 and of the turning over to them of the said promissory note, and of the allowing to them to retain the said sum of \$25,750.00 were all void, illegal, contrary
812 to law and in violation of the rights of said corporation and of this plaintiff, as a stockholder thereof; and that the further acts of the said board of directors in purporting to declare and attempting to declare the said dividend of \$111.00 per share as a part of the same transaction, under the same agreement by which the said money and note aforesaid were paid to and turned over to the said Albert Steinfeld, were illegal and void and in violation of the rights of said corporation, and of this plaintiff, as a stockholder thereof, and that said dividend was illegally declared and that all money paid thereunder was illegally paid and that the same, at all times, belonged to and is now the property of said defendant, the Silver Bell Copper Company.

2. Judgment against the defendant, Albert Steinfeld, that he do pay to the defendant, the Silver Bell Copper Company, the sum of \$145,743.75; the sum of \$103,967.00; the sum of \$33,000.00; the sum of \$27,639.00; the sum of \$25,750.00; the sum of \$111.00, making a total of \$338,710.75, with interest thereon from the 10th day of January, 1904, at the rate of 6 per cent per annum.

813 3. That Defendant, Mammoth Copper Company, pay to said Silver Bell Copper Company all money it may have received under or by reason of any of the wrongful acts above alleged and set out.

4. That defendants, Steinfeld, Shelton Curtis and Mammoth Copper Company do severally and collectively account and pay to said Silver Bell Copper Company any and all money they severally or collectively may have received for or for the benefit of said Silver Bell Copper Company, or which they may have received wrongfully or illegally from said Silver Bell Copper Company; to that end a full and complete account be had by and from each and all of

said defendants (other than said Silver Bell Copper Company) in favor of and to said Silver Bell Copper Company;

5. Judgment in favor of this plaintiff and against the said Silver Bell Copper Company, that the said Silver Bell Copper Company pay to and reimburse this plaintiff for all of the expenses of this action, including such costs and attorneys' fees as he shall have paid and expended up to the close of the trial of this action and

814 that said Silver Bell Copper Company pay to the said above named attorneys such further and additional sum as attorneys' fees as this court shall deem equitable, right and just in the premises, and that each and all of the other defendants pay to the said Silver Bell Copper Company the costs of this action;

6. That a receiver be now appointed by this court to take charge of and receive all of the moneys, books, papers and other assets of said corporation to hold the same for the benefit of said corporation for its creditors and its stockholders and the same may be hereafter disbursed, paid out and distributed as to this court may seem right meet and proper and in accordance with equity and good conscience and the rights of the parties interested therein.

7. For such other and further relief in the premises as to the court may seem right and proper.

FRANK H. HEREFORD AND
EDWIN A. MESERVE,

Attorneys for Plaintiff.

Filed January 4, 1908.
Verified by plaintiff.

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SCHEDULE EXHIBIT "A."

List of Properties Sold by the Silver Bell Copper Company to Imperial Copper Company on May 20, 1903.

Mammoth, Copper, Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen and Enterprise, also all other mining claims, mill sites and locations, which said parties of the first part, or either of them, or they or any representatives have, or possess, in said Silver Bell Mining District, and not above enumerated; also all the property and plant, machinery, appliances, supplies, store goods, live stock and everything at present belonging to said mining claims and which is the property of either of said Silver Bell Copper Company or said Mammoth Copper Company.

816 *List of Mines Known and Referred to in this Amended Complaint as English Group of Mines.*

Herbert, Confidence, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, Enterprise.

Filed January 4, 1908.

Defendant's Motion to Strike from Complaint.

(Title of Cause.)

Now comes the defendants and move to strike from the Third Amended Complaint as irrelevant, redundant and uncertain, the following portions thereof, to-wit:

817 *First Cause of Action.*

1. On page 2 at line 5, the following words: "That thereafter and prior to the 20th day of May, 1903, three hundred shares of the said stock were purchased by said corporation, the same being taken in the name of Albert Steinfeld, trustee; that at all times after said purchase said Albert Steinfeld held said stock in his possession as trustee as the property of and for the benefit of said corporation."

2. Page 12, the last line, the following words: "Purchased from the said Carl Nielsen the said three hundred shares of stock belonging to said Carl Nielsen and."

3. Page 19, 6th line from the bottom, the following words: "and that the three hundred shares of stock purchased by said Albert Steinfeld as in this amended complaint alleged from said Carl Nielsen as trustee, was always held by him as trustee for the use and benefit of said Silver Bell Copper Company."

4. Page 27, 9th line, the following words: "And of the said three hundred shares of stock from said Carl Nielsen."

818 5. Page 29, line 20, the words: "And said stock."

6. Page 38. All of paragraph VII.

If the motion to strike out all of paragraph VII should be denied, then strike out the following portions thereof:

1. All of that portion on page 38, and the first half of page 39 down to and including the words, "to his own use."

7. Page 42, line 1, the words "two hundred and fifty shares of"

8. And lines 1, 2 and 3 the words "being the 249 shares standing in his name and the one share standing in the name of the said Shelton as hereinabove set out."

Second Cause of Action.

1. Page 44, lines 4, 5 and 6 the words, "to paragraph III, to paragraph IV, to paragraph V, to paragraph VI to paragraph VII."
2. Strike out all that portion of paragraph IX referred to on the 6th line of said page 44 from the commencement of said paragraph down to and including the words, "and set out" on the 6th line from the bottom of page 42.
3. Page 43, 6th line from the bottom, the following words: "no part of any of said money so paid to the said Albert Steinfeld or retained by him as hereinbefore alleged and no part of the proceeds of said note so delivered to him, and."

FRANCIS J. HENEY,
EUGENE S. IVES.

Filed January 4, 1908.

Answer to Third Amended Complaint.

(Title of Cause.)

Now comes the defendants other than the Mammoth Copper Company, and demur to the plaintiff's third amended complaint, on the following grounds:

I.

That there is a defect of parties defendant in that the defendant the Mammoth Copper Company is not a proper party to the second cause of action in said third amended complaint set forth.

II.

That there is a mis-joinder of causes of action in that the proper parties defendant to one cause of action in said third amended complaint set forth are not proper parties defendant to the other cause of action in said third amended complaint set forth.

III.

That the facts alleged in the first cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

IV.

That the facts alleged in the second cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

V.

That the first cause of action in said third amended complaint set forth is barred by limitation.

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VI.

That the second cause of action in said third amended complaint set forth is barred by limitation.

FRANCIS J. HENEY,

EUGENE S. IVES,

Attorneys for Defendants.

And now comes the defendant, the Mammoth Copper Company and separately demurs to the plaintiff's third amended complaint on the following grounds:

I.

That there is a defect of parties defendant in that defendant, the Mammoth Copper Company, is not a proper party to the second cause of action in said third amended complaint set forth.

II.

That there is a misjoinder of causes of action in that the proper parties defendant to one cause of action in said third amended complaint set forth, are not proper parties defendant to the other cause of action in said third amended complaint set forth.

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III.

That the facts alleged in the first cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

IV.

That the facts alleged in the second cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

V.

That the first cause of action in said third amended complaint set forth is barred by limitation.

VI.

That the second cause of action in said third amended complaint set forth is barred by limitation.

FRANCIS J. HENEY,

EUGENE S. IVES,

Attorneys for Defendant, Mammoth Copper Co.

If the foregoing demurrers be overruled, the defendants further answering the first cause of action in the third amended complaint set forth, allege and aver:

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I.

Defendants deny that prior to the 20th day of May, 1903, three hundred shares or any of the stock of the Silver Bell Copper Company were purchased by the said company, the same being taken in the name of Albert Steinfeld, trustee or otherwise, or at all, or that at all or any times after said alleged purchase the said Albert Steinfeld held said stock or any thereof, in his possession as trustee, as the property of or for the benefit of said corporation, or that long prior to the said 20th day of May, 1903, or at any time, the actual outstanding stock of said corporation had been seven hundred shares or any less than one thousand shares, or that one share of the stock standing upon the books of the company in the name of R. K. Shelton is in fact the property of Albert Steinfeld, or that said Shelton, as a matter of fact, has no interest of property therein, and alleges that on the 9th day of December, 1903, the said Shelton became the owner of one share of said stock and ever since has
 824 been, and now is, the owner thereof.

And defendants allege that long prior to the 20th day of May, 1903, and at all times between the date of the purchase of the said 300 shares of stock until the said 20th day of May, 1903, the said Steinfeld owned 549 shares of the capital stock of the said defendant corporation, and that the said Steinfeld owned the said 549 shares of stock prior to and at the time of the declaration of the dividend in the said amended complaint set forth and from said time to the commencement of the said action, and that the said Steinfeld now owns the same.

Defendants deny that the Mammoth Copper Company is an instrument in the hands of Albert Steinfeld, used by him for the purpose of covering up any alleged or intended frauds or illegal transactions; and deny that all or any of the acts or things done by the said Steinfeld or in the name of the said Mammoth Copper Company, or all or any of the things received, given or paid by, to or in
 825 the name of the said Mammoth Copper Company, were in fact acts or things done or received, given or paid by or to the said Albert Steinfeld.

The defendants deny that any money which may on its face have been paid to the defendant Albert Steinfeld or any property which may on its face have been delivered to the said Albert Steinfeld as in any part of the third amended complaint alleged or set out, for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company jointly, were in fact or in truth paid or delivered to the said Albert Steinfeld or were appropriated by him to his own individual use; and allege that all moneys received by the said Steinfeld as belonging to himself and the said Mammoth Copper Company were received by him on behalf of the said Mammoth Copper Company by its authority and as its agent, and that the said Steinfeld had no interest in any of said moneys so paid to him on behalf of said Mammoth Copper Company except in so far as he was a stockholder of the said Mammoth Copper Company.

II.

826 The defendant Shelton denies, and the other defendants deny upon information and belief, that the defendant Shelton at all or any of the times mentioned in the amended complaint has been the representative of said Albert Steinfeld on said board of directors of the said Silver Bell Copper Company, or that during all or any of said times he has voted as ordered or directed or requested by said Albert Steinfeld and not otherwise; and allege that said Shelton has at all times voted as a director independently and as he believed for the best interests of said corporation.

The defendant Curtis denies, and all of the other defendants upon information and belief deny, that the defendant Curtis during all or any of the times in the complaint mentioned was under the control or direction of the said Albert Steinfeld or as director of said corporation, at all or any times, did what the said Albert Steinfeld directed, and at no time, under no circumstances did any act, take any vote or cast any ballot except as requested or directed by said Albert Steinfeld, and alleges that said Curtis has at all times voted as director independently and as he believed for the best interests of said corporation. And the defendants deny that the

827 said Albert Steinfeld was at all or any of the times in the amended complaint mentioned, in fact, by reason of his alleged control of the other two members of the said board or either of them, in absolute or any control or direction of the board of directors of the above corporation and the defendants deny that all or any acts, things or votes taken by said board since the 20th day of May, 1903, and up to and including the date of the filing of the complaint were taken by or under the direction of the said Steinfeld or at his request and not otherwise, and deny that all or any of the votes, motions, resolutions or other acts of said board adopted, passed or done by it, were done by or under the direction of or control of the said Albert Steinfeld and not otherwise, and allege that all acts, things and votes taken by said board, and all motions, resolutions and acts of said board were the independent acts thereof, with a view to the best interests of the corporation.

The defendants deny that because of any facts it will be, or would have been idle or useless act for the plaintiff to make demand
828 on the said board of directors to bring action for the recovery of property belonging to the said corporation or for the payment to said corporation of any debt owing by any or either of the parties hereto to said corporation, or that any such action, if brought in the name of said corporation would not be prosecuted in good faith or with full intent that full recovery should be had thereon for the benefit of said corporation or of the plaintiff as a stockholder thereof.

III.

The defendant Steinfeld denies and the other defendants upon information and belief deny that the defendant Steinfeld at all or any of the times in paragraph III of the third amended complaint set forth, or at any time prior to the dissolution of the firm of L.

Zeckendorf & Co. employed or discharged all of its help, or gave or extended all credits or determined its business policy in all matters or things in the Territory of Arizona, or in connection with its business therein; and the defendant Steinfeld alleges, and the other defendants upon information and belief allege that said 829 Zeckendorf during all of said times, assumed the right, and at various times exercised the right to employ and discharge help of the said firm; and that said Zeckendorf assumed the right and exercised the same to limit credits given or extended by the said firm and to determine its business policy in matters and things in the said territory and in connection with the said business therein.

The defendant Steinfeld denies, and the other defendants upon information and belief deny that the said Steinfeld caused to be conveyed to the said Nielsen Mining and Smelting Company the Old Boot mine for an agreed price of \$25,000.00 or for any price whatever; and alleges that he caused an option to be given to the said Nielsen Mining and Smelting Company to purchase the said mine for the agreed price of \$25,000.00 to be paid to the said William and Julia Zeckendorf in installments of \$2,500 quarterly.

The defendants deny that Carl Nielsen was elected the nominal general manager and superintendent of the said company, and alleges that the said Nielsen was elected general manager and 830 superintendent of the said company actually and in fact; and deny that at all or any times after the organization of the said company or at any time whatever, the said Steinfeld assumed to be the general manager of the said company or assumed the power of conducting its affairs or any of them, or of controlling all or any of its actions, or assumed the power of directing its affairs or any of them, or of controlling all or any of its actions, or that said alleged assumption of power on the part of the said Steinfeld was assented to or acknowledged by the said Curtis, Nielsen and Shelton or any or either of them, and deny that said Steinfeld was at all or any times thereafter the actual manager or managing agent of said company or of its affairs, or any of them; and the defendants allege that at all times from the organization of the said company down to the 20th day of May, 1903, the said company was heavily indebted to the said firm of L. Zeckendorf & Co., and that the said company at no time was able to pay the said indebtedness; that its stock had all 831 been issued and was non-assessable and that by virtue of its articles of incorporation the indebtedness of said company was limited to the sum of \$25,000, and that the said company on the first day of January, 1900, and at all times between the said first day of January, 1900, and the 20th day of May, 1903, was indebted to the said firm of Zeckendorf & Co., in a sum greatly in excess of the sum of \$25,000, and that the said company was at all times unable to pay the said sum of money or to reduce the said indebtedness below the sum of \$25,000, and that any influence on the part of the said Steinfeld, either personally or as manager of the firm of L. Zeckendorf & Co. upon the affairs or operations of the said company arose from the fact that the firm of Zeckendorf & Co. was a creditor of the said company as aforesaid and that the

withholding of further credits and advances by said firm to the said company would necessitate the cessation of active operations by the said company.

The defendants deny that large or any ore bodies in the Old Boot mine were developed or were extended to within a short distance of the boundary line thereof, being the dividing line between the said mines and the Prospector mine, one of the mines known as the English group of mines in the third amended complaint referred to; and all of the defendants except the defendant Shelton allege, and the said Shelton upon information and belief alleges that at none of the times in the third amended complaint mentioned, were the workings in the Old Boot mine nearer than 200 feet to the said boundary line of the said Prospector mine; and the defendants deny that from said alleged development work, or at all, it became evident that said alleged ore bodies then or at any time developed underneath the ground in said Mammoth mine ran into said Prospector mine or either of said English group of mines, or that said alleged facts or either of them were ascertainable alone from an examination or inspection of the underground workings of said Mammoth or Old Boot mine; and the defendants deny that the defendant Curtis on the order or direction of the said Steinfeld took up in his own name other mines around or surrounding said Old Boot mine as in the third amended complaint set forth; and allege that the said Curtis took up mines as in said amended complaint on page 9 alleged of his own volition and account and for the best interests of the said company and without the order or direction of any person whatever.

The defendants deny that the said Mammoth or Old Boot mine during the fall of the year 1899, and up to the time of the closing of said mine in the spring of 1900, was being worked at a profit; and deny that at the time of the closing of said mine it was yielding a profit of about \$500 per day or \$15,000 per month.

The defendants deny that in the fall of 1899, the said Curtis advised or informed, or at any time, advised or informed said Steinfeld that the development of said Mammoth mine showed that the underground ore bodies therein would run into said Prospector mine, or other mines belonging to said English group of mines, or that said underground workings showed that there was probably great value in said English group of mines; and deny that the said Steinfeld in the month of January, 1900, or at any time assumed to discharge the said Nielsen as general manager and superintendent of said mines; and allege that in the discharge of the said Nielsen the said Steinfeld was repeating and carrying out the wishes and orders as informally but clearly expressed to him by the directors of the said company; and the defendants deny that the said Steinfeld ordered the said Mammoth mine to be closed down and all work thereon to be stopped in order that the English group of mines so-called and the Francis and Volkert titles thereto, or either of them, might be purchased at a nominal or small sum without the owners thereof obtaining knowledge through the workings of said Mammoth mine or the showing of ore therein that said

ore bodies probably did or would extend into the said English group of mines or any of them; and the defendants allege that at all times and prior to the organization of the defendant corporation, the Silver Bell Copper Company, the said Steinfeld had appreciated and known that it was important that the English group of mines should be acquired and owned by some one who would sell the same in one group with the group of mines owned by the said

835 Silver Bell Copper Company and that the said English group of mines and mines owned by the said Silver Bell Copper Company would, if sold in one group, sell for a larger sum than the total of the sums for which each group of said groups of mines could be sold for separately, and knew that the Old Boot mine and the other mines owned by the said Silver Bell Copper Company sold alone would not have a market value of enough money and could not be sold for enough money to reimburse the said firm of L. Zeckendorf & Co. for the amounts owed by the said company to the said firm, and at the same time pay a reasonable compensation to the said Curtis and to the firm of Zeckendorf & Co. for the time and attention which the indebtedness of the said company to the said firm had required and made necessary.

And the defendants deny that the said Curtis as the president of the said defendant corporation, frequently advised or notified said Steinfeld that it was very desirable that said English group of mines should be purchased, but admit and allege that the said Curtis and the said Steinfeld frequently discussed each with the other, the fact which was at all
836 times known to both of them, that it was very desirable that said English group of mines should be purchased as aforesaid; and the defendants deny that the said Steinfeld before the alleged order that said mine be closed or work thereon be stopped, ascertained or learned the truth of the alleged statements or any of them alleged to have been made to him by said Curtis as to either the ore bodies in the said mine or their tendencies or to the necessity of acquiring title to said English group of mines, and deny that said Steinfeld acquired such or any information only or solely because of the fact that he was acknowledged or conceded to be the actual manager of said Nielsen Mining and Smelting Company, or because of his assumption of such power or of such possession, or that he acquired said alleged knowledge or information solely from said Curtis, or from his examination of said mine made by him as such alleged, assumed or acknowledged actual manager of said company; and deny that the personal control of said mine was at the time of the discharge of said Nielsen or at any time, placed in said

837 Curtis by direction of the said Steinfeld; and allege that the said Curtis at all times from the organization of the said company was its president by virtue of that position and of his general employment and agreement with the said firm of Zeckendorf & Co., had general control and superintendence of the said mine and deny that said mines were closed down by said Steinfeld solely or exclusively for the purpose of enabling him as the agent or representative of the Nielsen Mining and Smelting Company or at all to

acquire such English group of mines or any of them or the Volkert and Francis titles thereto or any or either of them or getting rid of said Neilsen; and allege that at the time of the closing down of said mines the said company was indebted to the said firm of L. Zeckendorf & Co. in a sum in excess of \$75,000, and that there was no ore in sight capable of supplying the smelter which was being operated by said company and that the said smelter was shut down by reason of the fact that there was no ore in sight wherewith to operate the same; and allege that no development work could be done or prosecuted upon the said mine except with an outlay of money and

838 that the said mine had no funds with which to pay for any development work and no way under its charter and the laws of the Territory of Arizona or of the United States of acquiring any money for purposes of operation or development work or for the acquisition of any other properties or for any purpose whatever.

The defendants deny that on or about the 29th day of June, 1900, the said Steinfeld as agent or representative of or for the benefit of the said Neilsen Mining and Smelting Company purchased from the said Neilsen 300 shares of the stock belonging to the said Neilsen; and allege that said Steinfeld purchased the said stock with his own money and for his own use and benefit and not otherwise; and that in making said purchase and thus getting rid of said Nielson the said Steinfeld aimed to benefit, and, as a matter of fact, did benefit the said corporation by getting rid of an inharmonious factor in its management and ownership of stock, to-wit, the said Nielson, although the said corporation did not receive the direct benefit of the acquisition by itself of the said shares of stock; and the defendants

839 allege that under and by virtue of the charter of the said corporation and the laws of the Territory of Arizona, the said corporation was wholly without right to purchase its own stock either in its own name or through any person or in the name of any other person as trustee; and that the purchase of its own stock by said corporation would have been an ultra vires act; and the defendants further allege that at the time of the purchase of the said stock as aforesaid, the said corporation was indebted to the firm of L. Zeckendorf & Co. in an amount in excess of the sum of \$75,000 and that the said company was prohibited by its charter from incurring indebtedness in excess of the sum of \$25,000, and that it had no money or funds on hand and that the said company had no right or authority under its charter and the laws of Arizona to incur any further indebtedness for the purchase of the said stock or mines or for any purpose whatever; and deny the interpretation of the said agreement of June 29, 1900, as in paragraph III of the third amended complaint alleged and set forth on pages 12 and 13 thereof, and, deny that the agreement therein alleged and set forth was ever made or

840 entered into and, upon the trial of this action defendants will produce the true and only agreement on that subject which was ever made or entered into, and refer to the same; and defendants deny that said sum of \$10,000 due under said contract was paid by said Steinfeld to Mary Nielson, the successor of Carl Nielson out of

the proceeds of the sale of the said mine derived from such Imperial Copper Company, and allege that the said \$10,000 was paid to the said Mary Nielson by the said Steinfeld out of his own funds and on or about January 24th, 1904.

And defendants deny upon the closing down of the said mine and in the spring of 1900, said Steinfeld as agent or representative of or for the benefit of the said Nielson Mining and Smelting Company purchased from said Francis and Volkert their interest in said group of mines, and allege that on or about the 15th day of May, 1900, the said Steinfeld purchased from the said Francis and Volkert their interest in the said mines for the sum of \$15,000, \$2,500 in cash and \$12,500 to be paid out of the proceeds of the sales of the said mine, in the event that the same were sold, and

841 that he paid to the said Francis and Volkert the said sum of \$2,500 out of his own funds at or about the said 15th day of May, 1900, and that he made the said purchase for his own use and benefit and not otherwise; and allege that the acquisition of said mines by the said Steinfeld was a benefit to the said defendant corporation by reason of the fact that the said Steinfeld was ready at all times after his acquisition of the said mines to sell the same in conjunction with the said Silver Bell Copper Company as one group of mines, and that as hereinbefore alleged the sale of the said two groups of mines as one group would enable the owners of each group to obtain a larger price for the group belonging to each of them than if the said groups were sold separately and without relation each to the other; and the defendants allege that at the time of the acquisition of the said Francis and Volkert titles by the said Steinfeld and at the time of the acquisition of the English titles to the said English group of mines by the said Steinfeld, to-wit, in the fall of 1900,

the said defendant, the Silver Bell Copper Company, was indebted to the firm of Zeckendorf & Co. in a sum in excess of the sum of \$75,000 and that the said company by its charter and the laws of Arizona was not authorized to incur any indebtedness in a sum greater than the sum of \$25,000, and had no money or funds on hand, and was, therefore, unable and unauthorized to purchase the said mines or any of them or any property whatever.

And the defendants deny that the said sum of \$12,500 or any part thereof was paid by said Steinfeld to said Francis or Volkert out of the proceeds or any thereof, received from said Imperial Copper Company and allege that the said sum of \$12,500 was paid by the said Steinfeld out of his own personal funds on or about January 10th, 1904; and the defendants deny that the sum of \$5,000 paid by the said Steinfeld for the English group of mines to the holders of the English titles thereto and the said sum of \$2,500 paid to said Francis and Volkert were amounts much or any less than the said mines could have been purchased for if the owners of said English group of mines had been possessed of all of the knowledge that

the said Steinfeld had acquired of the tendency of the ore bodies in said Mammoth and Old Boot mines; and deny that 843 said Steinfeld was enabled to purchase said mines at such alleged reduced price wholly or solely because of the fact that the said

mines were shut down or that said workings thereon were stopped; and deny that the said mines were shut down and the workings thereon stopped to the great or any loss or damage of the said Nielson Mining and Smelting Company, and allege that long prior to the shutting down of said mines in the spring of 1900, the said Steinfeld had entered into an agreement with the owners of the titles to the English group of mines to purchase from them such English group of mines for the sum of \$5,000, and that the final purchase of the said mines by the said Steinfeld was only a consummation of the said agreement theretofore made to purchase the same. The defendants deny that when the mines were again put in operation and worked profits could not be derived from the said workings by reason of the alleged depreciation of the price of copper; and deny that the said mines sustained a great or any damage by reason of the

844 shut down of the said mines or the depreciation in the price of copper or a damage far or at all in excess of the price paid by said Steinfeld for said mines.

Defendants deny that immediately or at any time upon acquiring said two mines from the said Nielson and Lewis and said English group of mines, the said Steinfeld turned the same over to the possession of the said Nielson mining and Smelting Company prior to the month of December or at any time, or that said Nielson Mining and Smelting Company thereupon or at any time assumed the possession thereof or the control thereof, or at all times thereafter by the consent or with the knowledge of the said Steinfeld treated the said mines or any thereof as its own, and deny that in the month of December, 1900, said Nielson Mining and Smelting Company performed the annual assessment work on the said mines required by the laws of the United States to be performed on all mines for the year 1900, or thereafter performed said assessment work on said mines for the year 1901 and the year 1902, except as hereinafter alleged and set forth.

845 Defendants deny that the said Curtis prepared maps or reports of the said properties under the direction of the said Steinfeld except as hereinafter admitted and alleged; and defendants deny that the said Curtis as the president of the said Silver Bell Copper Company or at the direction of the said Steinfeld credited said Steinfeld with all or any of the money which he had paid to the said Volkert or to the said Nielson for the English titles or credited him with one per cent interest on such sums, or that said or any credit in favor of the said Steinfeld on the books of the said company were made by or at the direction of the said Steinfeld or included in said alleged credit the expense of his son and himself to various places on the continent of Europe taken at the same time and in no way connected with the said trip to England for the purpose of purchasing the said mines, or caused himself to be credited with all or any moneys paid by him for or on account of or in any way connected with the purchase of the said mines; and allege that prior to the 19th of May, 1901, one Selim M. Franklin,

as the personal and confidential attorney of the said
846 Steinfeld and who had been for many years and was then
the attorney for the firm of L. Zeckendorf & Co., and as
attorney for the firm of L. Zeckendorf & Co. had organized the said
Nielson Mining and Smelting Company and was at all times from
and after the organization of the said Nielson Mining and Smelting
Company its attorney. That the said Franklin at all of said times
was duly admitted to practice law in the Territory of Arizona; that
prior to the 19th day of May, 1901, the said Steinfeld claimed to
be the owner, for his own use and benefit of the said English group
of mines and the said 300 shares of stock purchased from the said
Nielson as aforesaid; that the said Curtis and the said Franklin
claimed to the said Steinfeld that he held the said stock and the
said mines as trustee for the said Silver Bell Copper Company, and
that the said Franklin advised said Steinfeld, as a matter of law,
that the conditions under which the said Steinfeld had purchased
the said stock and the said English group of mines from the said
Francis and Volkert and the English owners thereof were such that
the law would not permit the said Steinfeld to retain the
847 beneficial ownership of the said mines or of the said stock;
that the said Steinfeld had confidence in the legal opinion,
wisdom and judgment of the said Franklin, and in his integrity
and was influenced by the said representations of the said Franklin,
and did thereupon believe that while he had purchased the said
stock and the said mines with his own money and for his own
use and benefit that the said Franklin had correctly stated the law
to him and that he therefore held the said stock and the said mines
as trustee for the said company, and that such opinion and belief
of the said Steinfeld was due wholly and exclusively to such opinion
of the said Franklin and such statement by the said Franklin to the
said Steinfeld made to the said Franklin as his attorney and as the
attorney for the said company; and that thereupon, and on or about
the 19th day of May, 1901, the said Steinfeld by reason of such
representations and statement and opinion of the said Franklin,
and wholly influenced thereby, did write to the said Curtis, suggest-
ing that the said Curtis credit him on the books of the Neilson
Mining and Smelting Company, as trustee, for the disburse-
848 ments incurred in the purchase of the said group of mines
and the said 300 shares of stock and asking for the interest
on the same to date; and that thereupon, and acting upon the said
letter so written by the said Steinfeld, and wholly influenced by the
advice and opinion of the said Franklin, the said Curtis, did make
such entries in said books, which are the entries referred to in the
third paragraph of the third amended complaint at pages 16 and 17
thereof; and that the said Curtis did thereupon send to the said
Steinfeld checks of the said Silver Bell Copper Company for the
interest upon said amounts so disbursed by the said Steinfeld. That
thereafter the said Steinfeld did consult the said Franklin as at-
torney as aforesaid with respect to the said entries and the said
checks for interest, and the said Franklin did advise the said Stein-
feld that the said company had no authority to obligate itself to

repay to the said Steinfeld the said sums so disbursed by him or to pay to the said Neilson and to the said Francis and Volkert the \$10,000 and \$12,500, respectively, due to them, and that the
849 said Steinfeld was not entitled to the said interest, and that the said company was under no obligation to pay to the said Steinfeld the amount so disbursed; and that thereupon the said Steinfeld, relinquished the claim which he had made, acting as he had thought under the advice and direction of the said Franklin as attorney as aforesaid, and returned to the said Curtis as President of the said Silver Bell Copper Company the said checks for interest which the said Curtis had sent to him, and that the said entries were made and the said interest was paid under a misapprehension and mistake of law by both the said Steinfeld and the said Silver Bell Copper Company, and such correction was consummated and ratified by the receipt from the said Steinfeld and by the said Curtis as President of the said Silver Bell Copper Company of the interest upon said amounts which had been sent by the said Curtis to said Steinfeld under such mistake as aforesaid; and the defendants deny that such credit or charge on the books of the said company so made by said Curtis in the month of May, 1901, was made on the written
order or direction of the said Steinfeld or that in any writing
850 the said Steinfeld stated that said moneys so paid by him were paid as an advance to or for the use of the said Silver Bell Copper Company.

Defendants deny that after the said month of May, 1900, and in the month of July, 1901, the said Curtis and the said Franklin went to the said Albert Steinfeld and stated to him that they understood he would claim such English group of mines as his own; and allege that they went to the said Steinfeld and so stated to him prior to the 19th day of May, 1901; and allege that the various representations alleged in paragraph III of the third amended complaint on pages 17 and 18 to have been made by the said Franklin and Curtis to the said Steinfeld were made not in the month of July, 1901, but prior to the 19th day of May, 1901, and deny that the said Steinfeld at any time agreed to the effect that he held such properties in trust for said Silver Bell Copper Company except as hereinbefore alleged; and deny that the said Steinfeld stated that all he desired was a repayment of the moneys which he had advanced or which he had
theretofore caused the said Curtis to credit on the books of
851 the said Silver Bell Copper Company or then or there agreed that he would continue to hold said properties or any thereof in trust for said Silver Bell Copper Company until his action in purchasing the same was disaffirmed or affirmed by the stockholders of said Silver Bell Copper Company, at which all of the stock should be voted by persons competent to vote the same, or that he then and there agreed that he would continue to hold said properties in trust for the said company or at all; and deny that no stockholders' meeting was ever held or that the action of the said Steinfeld was never disaffirmed; and deny that the said company ever prior to the 20th day of May, 1903, ratified and affirmed the alleged purchase by said Steinfeld of the said properties and said stock as being

been so purchased by him as its agent and for its use and benefit; and deny that the said company at any time prior to about the 20th day of May, 1903, obligated itself to pay or agreed to pay to the said Steinfeld the sums of money paid by him for the said stock or the said English group of mines or any thereof, or offered him any sum whatsoever with respect to the same or any thereof, or

852 offered to obligate itself to pay with respect to the same or any thereof; and deny that the said Steinfeld ever stated in a letter addressed to the plaintiff that he had always held said properties in trust for the said Silver Bell Copper Company, or that he had advanced said money for the use and benefit of the said company or that he advanced or paid to the said Neilson \$2,000 for the said company, and defendants deny that the said Steinfeld at divers or different times during the year 1900 before the purchase of the said English group of mines or at any time before such purchase by letters to the plaintiff and to the said Curtis or either of them stated in effect or at all, or in any way, that he was going to purchase the same for the Neilson Mining and Smelting Company or for its use or benefit; and defendants deny that in the month of March, 1901, or at any time, the said Steinfeld called upon the said Curtis to prepare a written report of the mines or mining properties of the Silver Bell Copper Company, or that on the 24th of March, 1901, and pursuant to the said alleged request the said Curtis as the president of the said company, delivered to the said

853 Steinfeld a written report or statement, particularly describing the properties of the Silver Bell Copper Company in which written report the said Curtis included a description of the said English group of mines or that said Steinfeld in said month of March, or in the month of April, 1901, circulated said written report or at all, copies thereof to various or to different people, or to the plaintiff, as being a correct report of the mines or mining properties of said Silver Bell Copper Company in the sense and with the meaning and significance as in said paragraph III of the third amended complaint at page 19 thereof alleged; and allege that the said Steinfeld was at all times ready and willing that the said English group of mines should be sold as one group with the properties of the Silver Bell Copper Company, and that all requests, reports and statements with reference thereto as in said portion of the said amended complaint set forth mean, and were intended by the said Steinfeld to mean that the said properties were to be sold as one group

854 with the properties of the said Silver Bell Copper Company and nothing else; and the defendants deny that the said 300 shares of stock or any thereof was always held by the said Steinfeld as trustee for the use or benefit of the said Silver Bell Copper Company; and the defendants deny that the said Steinfeld has given options during the years 1901, 1902 and in the spring of 1903, or at all, on all of said mines described in said Schedule A, for one entire purchase price with no suggestion to any officer or member of said Silver Bell Copper Company that any part or portion of the said parties other than the said sum of \$18,117 was to come to him, the said Steinfeld, and alleged that at all times the said Steinfeld

insisted and expressed to the said Silver Bell Copper Company and to the said Curtis and to the said Franklin as representing it, that he would hold the said properties as his own, and for his own use and benefit unless a certain option given by him to the said Silver Bell Copper Company was availed of by said company before its termination on the 15th day of October, 1901, which said option

855 was afterwards extended until the 15th day of September, 1902; and defendants deny that the said Steinfeld without consultation with any officer of the said Silver Bell Copper Company fixed the price at \$515,000 on said entire group of mines and all of said properties; and deny that said price was fixed without any suggestion on the part of said Steinfeld that any part or portion thereof was claimed or would be claimed by him, except the said sums so expended by him for the purchase of the said mines; and deny that on the 13th day of May, 1903, or at any time, said Albert Steinfeld reported to the board of directors of said Silver Bell Copper Company that he had given an option to one George A. Beaton on all of the company's property for the purchase price of \$515,000, or that said option thereupon or at any time or upon the request of said Steinfeld, or at all, was confirmed, and allege that the said report made by the said Steinfeld on the 13th day of May, 1903, was as follows, to-wit: Mr. Steinfeld stated that on April 3, 1903, he had made or given on behalf of himself and the Mammoth Copper

856 Company and of this company (referring to the defendant the Silver Bell Copper Company) a written option to George A. Beaton for the sale amongst other things of all the property rights, interests and assets of this corporation (meaning the Silver Bell Copper Company) and that the other things referred to therein were the said English group of mines owned by the Mammoth Copper Company and certain mines owned by the said Albert Steinfeld, and that the said proposition so made by the said Steinfeld was set forth correctly and as hereinabove and in the language hereinabove cited, upon the minute book of the said corporation. Defendants deny that the first installment of the purchase price paid by the Imperial Copper Company and the four promissory notes were paid and delivered or received by said Steinfeld as the treasurer of the Silver Bell Copper Company as its property and deny that he in any capacity received it except in pursuance of a certain agreement hereinafter referred to and attached to this answer; and the defendants deny that the directors of the Silver Bell Copper Company adopted or caused to be spread upon its minutes under date of

857 May 20th, 1903, the resolution set forth on pages 23, 24, 25 and 26 of paragraph III of the third amended complaint after the consummation of the sale to the Imperial Copper Company or after the deed of the Silver Bell Copper Company to the said mines had been executed, or after all or any of the papers had been executed and delivered to the said Imperial Copper Company that were delivered to it in connection with the said deal or after the said Imperial Copper Company had paid to the said Steinfeld as the treasurer of said Silver Bell Copper Company or at all, the first installment or cash payment on said purchase price, or had delivered

to him the four promissory notes making up the balance of said purchase price; and allege that the said sale was consummated and the said deeds delivered and the said cash paid and the said promissory notes delivered after the passage of the said resolutions by the said directors and after the execution of the said agreement attached to this answer, and in pursuance of the said resolution and the said agreement.

IV.

The defendants admit that on and prior to the 20th day 858 of May, 1903, and at the time of the making of the sales in the complaint mentioned, the said defendant corporation, the Silver Bell Copper Company, was the owner of certain property in the Silver Bell Mining District, County of Pima, Territory of Arizona; and that some of the property set forth in Schedule "A" annexed to the amended complaint, at said time belonged to the said corporation, but deny that all of the property in said schedule exhibit "A" set forth at said time, belonged to the said corporation; and allege that those certain mining claims mentioned in said exhibit "A," known as the Silver Bell or English group of claims were at all times the property of the said Albert Steinfeld, and the Mammoth Copper Company, and that the said claims so belonging to the said Steinfeld and the Mammoth Copper Company are as follows:

Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, 859 Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, Enterprise.

Defendants deny that prior to the 20th day of May, 1903, or at any time the said Steinfeld in his own name and in the name of the Mammoth Copper Company, or in the name of either himself or of the said company, had purchased any properties listed or scheduled in said exhibit "A" or any portion thereof, in trust for or for the use of or benefit of the said defendant Silver Bell Copper Company; and the defendants allege that the said Steinfeld prior to said 20th day of May, 1903, did purchase certain of said properties, to-wit, those heretofore in this paragraph enumerated, with his own money and for his own use and benefit.

The defendant allege that on or about the 15th day of July, the said Steinfeld on behalf of himself and the said Mammoth Copper Company did make a certain offer or proposition to the said Silver

860 Bell Copper Company whereby he offered to sell the said properties to the said Silver Bell Copper Company for a certain sum of money, and whereby it was provided that the said offer should cease and determine on the 15th day of October, 1901, unless accepted by the said company on or prior to said date; and the defendants allege that the said Silver Bell Copper Company failed to accept or to avail itself of the said offer or proposition or to pay or offer to pay the sum of money stipulated therein or any part thereof

or to offer or to obligate itself to pay said sum or any part thereof, or to offer to buy the same on or before the said 15th day of October, 1901; and the defendants further allege that on or about the first day of October, 1901, the said Steinfeld did offer to the said Silver Bell Copper Company that he would extend the time within which the said Silver Bell Copper Company might avail itself of or accept the said offer or proposition until the 15th day of September, 1902, provided that in consideration of such extension of such time the said Silver Bell Copper Company would agree to do the annual assessment work required to be done on said property for the years

1901 and 1902, and that the said offer to extend the time for
861 the consideration aforesaid for acceptance of said offer made by the said Steinfeld was duly accepted by the said Silver Bell Copper Company by resolution passed by its board of directors on or about the said first day of October, 1901, and that in pursuance of the contract so made my said offer to extend the time and its acceptance the said Silver Bell Copper Company did do and perform the annual assessment work upon the said properties for the said years 1901 and 1902; and defendants allege that the said Silver Bell Copper Company failed and neglected to accept said offer and did not accept the same; and defendants deny, except as hereinabove in this paragraph alleged, that the said Steinfeld in his own name or in the name of the said Mammoth Copper Company had offered the said Silver Bell Copper Company in writing or otherwise that said properties or any thereof would be conveyed to said Silver Bell Copper Company upon said Steinfeld being paid back the amount of such expenditure or any amount, with or without interest, the said Silver Bell Copper Company in consideration thereof to pay the assessment work to
862 be done on said properties or any or either of them, or that said Silver Bell Copper Company did pay all or any of the assessment work required to be done on said properties or any or either of them.

Defendants deny that the defendant the Silver Bell Copper Company expended large or any sums of money in the development of the properties or any of them alleged in paragraph IV of the third amended complaint to have been standing in the name of Albert Steinfeld and the said Mammoth Copper Company. And defendants allege that the said Steinfeld and the said Mammoth Copper Company did give a license to the said Silver Bell Copper Company to extract ore from the said mines belonging to the said Steinfeld and the said Mammoth Copper Company, and that the said Silver Bell Copper Company in pursuance of such license did extract large quantities of ore from the said mines and did receive the profits and proceeds therefrom to its own use and benefit; and the defendants deny that the said Silver Bell Copper Company at all or any times after the purchase of said properties by said Steinfeld was in the pos-
863 session of or in the use or occupancy of the same or any thereof except as hereinbefore in this paragraph alleged.

The defendants deny that on the 20th day of May, 1903, or at any time the said Steinfeld presented to the said defendant, the Silver Bell Copper Company, the, or a renewal of said alleged offer, to

transfer said properties so standing in his name, or in the name of the said Mammoth Copper Company, or any thereof, upon his, the said Steinfeld, being paid the sum of \$18117 or any sum, and deny that said alleged offer, or any offer, except as hereinafter in this paragraph set forth, on the part of said Steinfeld was then and there, or at any time, accepted by said Silver Bell Copper Company by resolution of the board of directors of said company entered in the minutes of said corporation or was accepted in any way whatever, or that the said Steinfeld as a member of the said board, or at all, voted in favor of the said alleged resolution, or of the acceptance of said alleged offer or tender, and allege that on or about the said day, the said Steinfeld did make an offer to said company to transfer said properties to the said company for the sum of \$18,117 with certain modifications conditions and provisions, and the said modifications, conditions and provisions were a part of the said offer, and that the said offer with said modifications, conditions and provisions, was accepted by said corporation acting by resolution of its board of directors, and that an agreement was executed between the said Steinfeld and the said Mammoth Copper Company on the one part, and the said corporation on the other part, which said agreement was executed on or about the 20th day of May, 1903, and is the agreement mentioned and described in paragraph V of the third amended complaint, and called therein "A memorandum in writing denominated an agreement," to which agreement these defendants refer as part of this answer, and a copy whereof is attached hereto, marked exhibit "B."

The defendants deny that no separate transfer or conveyance of any of said properties was made by said Steinfeld or said Mammoth Copper Company, and deny that on or about the 20th day of May, 1903, or at any time, the Silver Bell Copper Company, sold to the Imperial Copper Company, a corporation, all or any of the properties described in said schedule exhibit "A" for the agreed price of \$515,000; and allege that on or about the said date the said Silver Bell Copper Company and the said Albert Steinfeld and the said Mammoth Copper Company did sell to said Imperial Copper Company certain properties, some of which belonged to each of them, for the full sum of \$515,000.

The defendants deny that the said Steinfeld and the Mammoth Copper Company or either of them joined in the deed to the Imperial Copper Company simply or for the purpose that the legal title to any of said properties which might be standing in the names of both or either of said parties, should be conveyed or transferred to said Imperial Copper Company; and deny that it was then or there, or at any time agreed by and between the said Silver Bell Copper Company, the said Imperial Copper Company and the said Steinfeld that the said \$515,000 purchase price of said properties was the property of the Silver Bell Copper Company or that all or any of the cash or notes representing said purchase price or installments thereof were the property of the said Silver Bell Copper Company; and allege that the said Steinfeld and the said Mammoth Copper Company joined in said deed for the purpose of con-

veying to the said Imperial Copper Company the title to all of the said properties which belonged to the said Steinfeld and the said Mammoth Copper Company.

Defendants deny that any money was paid or note or notes given to or received by the Silver Bell Copper Company for or on account of the said sale to the Imperial Copper Company; and allege that all moneys paid and notes given on account of the said sale were paid and given to the Silver Bell Copper Company in pursuance of the said agreement annexed hereto marked exhibit "B."

Defendants deny that the said Steinfeld out of the moneys received from the said Imperial Copper Company, paid to himself the sum of \$18,117, or any sum, and allege that the said sum was paid out of said moneys so received from the said Imperial Copper Company by the said Silver Bell Copper Company to said Steinfeld in pursuance of, and as part consideration of the said agreement exhibit "B."

Defendants deny that the said Steinfeld received of or from the said Silver Bell Copper Company the sum of \$18,117 or any sum as a full payment to him or to the said Mammoth Copper Company of all sums whatsoever or any sums which might be due or owing from said Silver Bell Copper Company for or on account of any or all interests that the said Steinfeld and the said Mammoth Copper Company or both or either of them had, or might have, in or to any of the said properties so listed and scheduled in said exhibit "A," and so sold and conveyed to said Imperial Copper Company or as a full payment of the said \$2000 paid by him to the said Neilson and Lewis, or either of them, and incorrectly and untruthfully alleged to have been advanced by him for said Silver Bell Copper Company; and deny that in accepting said sum of \$18,117 the said Steinfeld and the said Mammoth Copper Company or either of them thereby released or relinquished to the said Silver Bell Copper Company, any or all interests which either or both might have had, or did have, in or to any of said properties so listed or described in said schedule exhibit "A," or satisfied or paid all or any indebtedness that was owing to him said Steinfeld for moneys alleged to have been advanced to or for said Silver Bell Copper Company, whether as alleged in paragraph IV of the third amended complaint or otherwise; and deny that the said Silver Bell Copper Company was indebted to the said Steinfeld in any sum; and deny that the said Steinfeld at any time advanced any money or moneys to or for said Silver Bell Copper Company as alleged in said paragraph of said amended complaint or otherwise.

V.

The defendants deny that the said Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company after the completion of the said sale to the Imperial Copper Company and the receipt of the said sum of \$115,000 in cash, and the four promissory notes, each for \$100,000, or on or about the 26th day of May, 1903,

869 or not earlier than May 25th, 1903 or at any time, executed a memorandum in writing denominated an agreement, as in paragraph V alleged, in or by which the said parties recited over their signatures, that all or any of the proceeds of said sale, including the said notes and cash, were the property of the said Silver Bell Copper Company, and that the said Albert Steinfeld and the said Mammoth Copper Company had no interest whatever therein; and deny that said alleged memorandum so alleged to have been signed by the said parties was spread upon the minutes of a meeting of the said board of directors of said defendant corporation, the Silver Bell Copper Company, held after the 24th of May, 1903, or on or about the 26th of May, 1903, or at any time; and deny the interpretation of the said agreement as in paragraph V of the third amended complaint set forth; and allege that the paper attempted to be set forth and interpreted in said paragraph V of the third amended complaint and described therein as "A memorandum in writing denominated an agreement," is the agreement annexed hereto and marked exhibit "B"; and allege that prior to the receipt of the said money and notes the terms of the said agreement
870 were agreed to by the said Silver Bell Copper Company and the said Steinfeld, and that prior to the receipt of the said sum of money and notes, and on the 20th day of May, 1903, the said agreement was executed and ratified and approved by the board of directors of the said corporation, and a substantial copy thereof was spread upon the minutes of the said company; and deny that the same was done under the order, direction or control of said Steinfeld, or that said Steinfeld, controlled, directed or managed the other two directors.

Defendants admit and allege that the board of directors of the said Silver Bell Copper Company held a meeting on the 26th day of December, 1903, and passed a certain resolution wherein the said agreement was rescinded; and allege that said resolution as passed by the board is spread in full upon the minutes of the company; and the defendants deny that the said board did not attempt to rescind or did not rescind any other of the transactions of said meeting held on or about the 20th day of May, 1903, and entered in the minute book as being held on the said 20th day of May,
871 1903, or particularly did not purport or attempt to rescind, or did not rescind the transaction by which the Silver Bell Copper Company repaid to or reimbursed the said Steinfeld, and the said Steinfeld received from the said company the said sum of \$19,117; and deny that any action or purported action on the part of said board of directors, except with reference to the custody of said money or funds was not consented to by the plaintiff, or that the plaintiff has not consented to or ratified the same; and deny that the same, because of the facts alleged in the amended complaint or particularly because of the alleged fact that neither said Curtis, Shelton or Steinfeld for the reasons alleged in the said complaint or for any reasons was competent to act as a director of said company in any transaction or dealing with said Steinfeld, or at all, are not binding on said defendant corporation; and allege that the

said agreement marked exhibit "B" and referred to in said third amended complaint as "A memorandum in writing denominated an agreement," was totally rescinded and that the resolutions passed by the directors on said 20th day of May, 1903, and spread upon the minutes as having been adopted on said day were repealed, rescinded and annulled by virtue and in pursuance of the unanimous vote of all the stockholders of said defendant corporation, and in particular by the vote of the plaintiff, and that each and every act of the directors of the said corporation on the said 26th day of December, 1903, was done in pursuance and in consummation of the said unanimous action taken at said stockholders' meeting, which said stockholders' meeting was held on said 26th day of December, 1903, prior to the meeting of the directors; and allege that in pursuance of the action had at said stockholders' meeting and of the action of the said directors, an agreement was duly made, signed and executed by and between said Albert Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company whereby the said agreement marked exhibit "B" was rescinded and declared null and void ab initio; and further allege that prior to the execution of said agreement the said Steinfeld returned to the said Silver Bell Copper Company the said sum of \$18,117 and gave to the said Silver Bell Copper Company an order upon the Bank of California for the two notes deposited with said bank by the said Steinfeld and held by the said bank, and for the said sum of \$49,987.50, the balance of the proceeds collected by said bank and in its hands, and returned and paid over to the said Silver Bell Copper Company all proceeds of the said notes remaining in the hands of the said Steinfeld except such sums as had been paid out for or on behalf of the said Silver Bell Copper Company and except the sum of \$51,500 which had been garnisheed in the hands of said Steinfeld in a certain suit brought against the Silver Bell Copper Company by Selim M. Franklin of the city of Tucson; and that prior to the commencement of this action the Bank of California did deliver to the said defendant, the Silver Bell Copper Company, the said two notes and the said sum of \$49,987.50; and the defendants will produce upon the trial of this action the original book of the minutes of the meeting of the stockholders and directors of the Silver Bell corporation, and refer to the same and make the same a part of this answer.

Defendants deny that at the meeting of the stockholders of the company set forth and referred to on page 33 of the third amended complaint in paragraph V thereof, it was agreed and understood that the said contract marked exhibit "B" insofar only as it affected the custody and control of said money, should be rescinded; and deny that the disbursements and payment of any money by the said Curtis or the defendant company was wrongful; deny that the only matters discussed at said stockholders' meeting was the question of the custody of said money and the holding thereof by the said Albert Steinfeld as an indemnity to him for or on account of his guarantee to said Imperial Copper Company on the contract entered into with said Imperial Copper Company on

the said 20th day of May, 1903; deny that no reference was made at said meeting of any other resolution than the two resolutions set forth in said paragraph V of the third amended complaint on page 34 thereof; and deny that all discussions or actions taken at said meeting were intended to refer to such resolutions only or not to any other resolution or resolutions adopted or passed at a meeting held under date of May 20, 1903; deny that at said stockholders' meeting it was voted to rescind said resolutions set forth in said third amended complaint as aforesaid; and deny that it was voted to rescind any other or different resolutions; and deny that if the action taken at said stockholders' meeting had the effect on its face or at all of rescinding any other resolution or any other contract adopted on said 20th day of May, 1903, or under date thereof, or particularly the alleged contract entered into by the alleged acceptance of said alleged offer of said Albert Steinfeld as to the payment of said sum of \$18,117 or the payment thereof, such action was a mistake on the part of the plaintiff or was not intended as such, or was a mistake on the part of any of the other stockholders of said company present at said meeting, or was not intended as such; and the defendants allege that the action taken by the said plaintiff at said stockholders' meeting and his vote upon the resolution thereon was made after a full exposure to him and his counsel of all of the facts, minutes, resolutions and agreements which had been made or passed by the said Silver Bell Copper Company and that said alleged mistake was not mutual and that said Silver Bell Copper Company intended to make a full and complete rescission of the said contract and resolutions passed on said 20th day of May, 1903; and for a further and separate defense to the said alleged mistake, the defendant allege that such mistake, if any occurred, was made by the plaintiff, and the fact that he had made such mistake was discovered by the plaintiff more than one year prior to the filing of the second amended complaint herein, in which for the first time said alleged mistake was set forth and pleaded.

Defendants deny that the defendant Curtis, as treasurer of said company, at any or all times acted for or under the control or management of the said Albert Steinfeld, or that said Curtis as treasurer, without authority or right, paid to said Steinfeld out of the funds of the Silver Bell Copper Company the sum of \$145,763.75 or any sum, or delivered or caused to be delivered to said Steinfeld one of said notes; and the defendants further deny that the board of directors of the Silver Bell Copper Company on the 16th day of January, 1904, or at any time adopted any resolution wholly, or at all, under the control of the said Albert Steinfeld, or under his direction or management, or at his request, or as an act prepared by or for him; or that the action of the directors of the said company in paying or causing to be paid to the said Albert Steinfeld any note or moneys was without right, or that the said Albert Steinfeld, at any time appropriated or converted to his own use the sum of \$145,763.75 or any funds of the said Silver Bell Copper Company or any funds or note or notes belonging to the said Silver

Bell Copper Company; and deny that the said board of directors on the said 16th day of January or at any time passed any resolution to the effect that the said Silver Bell Copper Company, should deliver or cause to be delivered to the said Steinfeld any promissory note belonging to said corporation or to the effect that the said Steinfeld should retain as his own the sum of \$25,750, being one-half of the sum of \$51,500 in his hands belonging to the said Silver
878 Bell Copper Company and garnished by one Franklin as its property, or any sum whatever.

The defendants deny that the said Steinfeld before the commencement of this action received the said sum of \$145,743.75 and the said notes or either of them, or the said sum of \$103,967 the proceeds of said note or the sum of \$25,750 as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use or benefit, and not to the use or benefit of any other person, firm or corporation; and alleges that the said sum of \$145,743.75 and the said promissory note and the proceeds of the said promissory note were received by the said Steinfeld as belonging to himself and the defendant the Mammoth Copper Company as being one-half of the purchase price of the group of mines sold to the Imperial Copper Company, and as being a proportion thereof recognized by the board of directors of the company to rightfully belong to the said Mammoth Copper Company and to the said Steinfeld as the owners of the mines which were
879 sold to the Imperial Copper Company, and which did not belong to said Silver Bell Copper Company, and that the said money and note paid to the said Steinfeld were paid by authority of the said Mammoth Copper Company and as its agent and was received by him in pursuance of such authority and as such agent.

VI.

Defendants deny that the board of directors of the said defendant, the Silver Bell Copper Company, acting under the management or controlled by said Steinfeld, subsequent to the said 10th day of January, 1901, or prior to the 16th day of January, 1901, or at any time, caused to be sold either of the said two promissory notes remaining unpaid, and allege that the said directors in selling said note acted independently and for the benefit of and for the best interests of the said defendant corporation; and deny that the said Steinfeld sold or discounted both of the said notes at the same time, and as one and the same transaction; and deny that the other officers of the said Silver Bell Copper Company had warrant to do with the sale of either of the said notes; and deny that
880 the said Steinfeld purported to act or, in fact did act, as the sole or only controlling officer or agent of the said defendant, the Silver Bell Copper Company; and allege that the said note belonging to the said Silver Bell Copper Company was sold for the best interests of and by the said corporation, and for its full value, and with the knowledge and consent of all the directors and officers of the said corporation.

VII.

Defendants deny that any funds or property of the said Silver Bell Copper Company *was* misappropriated or wrongfully or at all diverted.

Defendants admit that on the 20th day of January, 1904, the directors of the Silver Bell Copper Company passed a resolution declaring a dividend of \$111 upon each of the 1,000 shares of the capital stock of the said company, and that the said Albert Steinfeld received the dividend upon the said 300 shares of stock purchased from the said Neilsen as aforesaid; and deny that the said stock stood in the name of Albert Steinfeld as trustee, for the
 881 benefit or as the property of the said Silver Bell Copper Company; and deny that the said Albert Steinfeld being solely or at all in control of the said defendant corporation the Silver Bell Copper Company or of its directors or either of them, or of the said Curtis as treasurer thereof, caused to be paid to himself the sum of \$33,000 or that he caused to be issued to the said R. K. Shelton a check for \$111; and allege that the said sums were paid by the treasurer of the said company to the said Albert Steinfeld and to the said R. K. Shelton in pursuance of a resolution of the board of directors and in the fulfillment of his duty as treasurer.

The defendants deny that the defendants Shelton and Curtis agreed to pass any resolution whatsoever declaring any dividend, or that the resolution referred to declaring a dividend was a part of any other transaction or that it was agreed that there should be paid to Curtis the sum of \$111 per share on the 170 shares standing in his name on the books of the company, or that in passing the said resolution the said Curtis and Shelton or either of them
 882 acted under the control, direction or management of the said Steinfeld; and allege that the resolution was passed by the directors for the benefit of the stockholders of the corporation without any agreement or consideration whatsoever, and that the \$18,870 paid to Curtis was paid to him as the proper dividend upon the stock belonging to him and in pursuance of the said resolution.

Defendants deny that any moneys paid to Curtis or to Steinfeld or to Shelton were paid under any alleged agreement or arrangement entered into at any time whatsoever, or in particular at the time when the sum of \$145,743.75 was paid to Steinfeld, or the note for \$100,000 was turned over to him; or that any or all of said acts were done under or as a part of any contract, transaction, or agreement, or that the said sum of \$18,870 was paid to the said Curtis in consideration for his agreeing that Steinfeld should be paid the sums or for any consideration whatsoever.

Defendants deny that said Steinfeld out of the proceeds of said promissory note or of said cash, turned over to him including the said sum of \$33,000 or otherwise, paid to the said Curtis the
 883 full share that 170 shares bears to 700 shares, or that said Curtis in fact received from said Steinfeld the full or any proportion of said cash and notes that he would have received if said

money and note or either thereof had not been diverted or paid to said Steinfeld but had been allowed to remain in the treasury of the said Silver Bell Copper Company and disbursed as dividends on all of the stock thereof; and deny that said Curtis did not give up to said Steinfeld as would appear from the reading of the record or otherwise, a sum approximating \$72,000, or received only the sum of \$18,870; and deny that said Curtis received from said Steinfeld the full amount of \$90,000 or its equivalent, in consideration of his voting as director on said 16th day of January or at any time or at the meeting held under such date, or at any meeting for the delivery to the said Steinfeld and the said Mammoth Copper Company of said cash and said promissory note.

VIII.

884 The defendants have no knowledge or information sufficient to form a belief as to the allegation in paragraph IX of the complaint contained, and, therefore, deny the same.

IX.

Defendants deny that at any of the times mentioned in the complaint, or any time whatever, the defendants acting as directors of the said Silver Bell corporation, or in any capacity attempted to divert from the funds of said corporation the sums mentioned in the complaint as paid to Steinfeld, Shelton and Curtis or any sum whatsoever; or that any or either of the defendants at any time knew that Steinfeld or the defendant, the Mammoth Copper Company, had no right, title, interest or estate in or to any of the properties described in schedule "A" annexed to the complaint, or knew that the said Mammoth Copper Company or Albert Steinfeld had no right to any money or property of the said Silver Bell Copper Company except such as Albert Steinfeld might have been entitled to by reason of his ownership of 250 shares of stock of the said company; or that the said parties knew that the payment to the said Steinfeld of the sums of money in the complaint

885 set forth and the delivery to him of the said note or either of said acts, was in violation of any right of the said corporation or of the plaintiff; or that the said acts of the defendants were done for the purpose of robbing the said corporation or of misappropriating or stealing its funds, or for the sole or only purpose of enabling the said Steinfeld to rob or steal from the plaintiff the share of the properties of the corporation which otherwise would be coming to the plaintiff as the owner of 250 shares of stock of said company or any share whatsoever; or that the defendants knew that they had no right to declare the said dividend of \$111 per share, the same being declared as a part of any alleged transaction or part of any alleged agreement whereby any moneys or notes were misappropriated, or that the said parties knew that in the declaration of said dividend and in the payment of the said moneys thereunder, they or either of them were violating their duties as directors of the said corporation or the duty or duties of any or either of them

as such, or were using the position of any or either of them
886 as directors to enable any or either of them or the said Stein-
feld to appropriate to his own use wrongfully, illegally or
in violation of the rights of this corporation or of this plaintiff the
funds or property of this corporation.

Defendants deny that the Silver Bell Copper Company now has
no other property except that which is shown by the complaint to
be left in the treasury of the said corporation or that said property
consists of money which the said directors illegally, unlawfully
or inequitably are trying to force upon the plaintiff as his share
of the visible proceeds of the sale of the properties of the corpo-
ration.

Defendants deny that Curtis and Shelton or either of them are
under the control or management of the said Steinfeld or that any
moneys of the said corporation have been illegally diverted, misap-
propriated or stolen from the said corporation in any manner what-
soever, or that said Steinfeld has control of the money or properties
of the said corporation now remaining, or will misuse such alleged
power or will misappropriate or wrongfully divert or convert the
funds or property of the said corporation in any manner
887 whatsoever, or that there is any necessity whatsoever for the
appointment of a receiver of the said corporation.

And for a further and separate defense to the said cause of action
in said third amended complaint set forth, the defendants allege
that the plaintiff and the said Silver Bell Copper Company were
guilty of laches in that they unduly delayed offering to pay to the
said Steinfeld the moneys which he had expended in purchasing the
said English group of mines in said third amended complaint men-
tioned and in offering to assume the obligations which had been
incurred by the said Steinfeld in purchasing the titles thereto.

And for a further and separate defense to the first cause of action
in the third amended complaint set forth, the defendants allege that
the said cause of action accrued more than three years prior to the
commencement of this action.

And for a further and separate defense to the said cause of action,
the defendants allege that the said cause of action accrued
888 more than four years prior to the filing of the second
amended complaint herein.

And for a further and separate defense to the said cause of action,
the defendants allege that the said cause of action accrued more than
four years prior to the filing of the third amended complaint.

And for a further and separate defense to that one of the two
causes of action set forth in one count in that portion of the third
amended complaint denominated as its first cause of action, the
defendants allege that the said cause of action and particularly in so
far as the facts constituting the same are in paragraph IV of said
third amended complaint set forth, accrued more than three years
prior to the filing of the second amended complaint.

And for a further and separate defense to that one of the two
causes of action set forth in one count in that portion of the third
amended complaint denominated as its first cause of action the

defendants allege that the said cause of action and particularly in so far as the facts constituting the same are in paragraph 889 IV of said third amended complaint set forth, accrued more than four years prior to the filing of the second amended complaint.

The defendants further answering the second cause of action in the third amended complaint set forth, allege and aver:

I.

The defendants hereby refer to paragraphs I, II, III, IV, V, VI, VII, VIII and IX of this answer, and by this reference make each and all of the denials, admissions and allegations contained in said paragraphs a part of this answer to the second cause of action, and hereby as a part of this answer to the second cause of action repeat each and every such denial and will allege each and all such allegations to be true.

The defendants deny that on the 29th day of June, 1900, or at any time, the defendant Steinfeld advanced to or for the benefit of the said Steinfeld the sum of \$2,000 for the purchase by Steinfeld as the trustee or managing agent of said Silver Bell Copper

Company, or for the use or benefit of said Silver Bell Copper 890 Company the said 300 shares of stock, or any thereof, issued to or belonging to said Carl Nielsen, or for the purchase from said Nielsen or one Lewis, or either of them, of those two certain mines mentioned in the said complaint and known as the "Accident" and "Black Rock;" and deny that at the same time, or at any time, the said Steinfeld for said corporation entered into a contract with said Carl Nielsen and his wife Mary Nielsen or either of them, by which he agreed to pay to the said Carl Nielsen or Mary Nielsen, or either of them, the further sum of \$10,000 out of the proceeds of the workings of said Old Boot mine or at all; or, in the event that the same should be sold before such payment was made, should pay the same other than out of the proceeds of the sale thereof; and allege that the said contract was made by the said Steinfeld for his own use and benefit; and defendants deny that the certificate for said stock was issued to said Steinfeld as trustee or in his own name as trustee, except as hereinafter alleged, or that the same was being held by him, or was held by him as trustee 891 as security for the repayment to him of said sum of \$2,000 so alleged to have been advanced the said corporation,

or of any sum, or act or thing; and deny that for or upon said sum or any sum, he thereafter charged such corporation interest; and deny that he held said stock as security to him that there would be paid to the said Mary Nielsen or Carl Nielsen, or either of them, the said sum of \$10,000 or any sum, out of the proceeds of the workings of the Old Boot or out of the proceeds of the sale thereof in the event such mine should be sold before the proceeds of the workings of said mine should pay the sum of \$10,000 or at all; and the defendants allege that plaintiff without the knowledge or consent of the said Steinfeld took the certificate of stock which had been issued to said Carl Nielsen and which had been endorsed in

blank by the said Nielsen, and which was the property of the said Albert Steinfeld, and pasted the same in the stock book, and caused the same to be marked "canceled" and himself drew a certificate for 300 shares of stock to the order of Albert Steinfeld, trustee; and without the knowledge or consent of the said Steinfeld, 892 represented to the said Curtis and Shelton that the said certificate was so issued in the name of Albert Steinfeld, trustee, because the said Steinfeld held it as trustee and procured by such representation, and without the knowledge or consent of the said Steinfeld, the issuance of the said certificate to the said Steinfeld as such trustee; and that the said certificate of stock was at all times the property of the said Steinfeld personally and not subject to any trust whatsoever.

Defendants deny that the said Albert Steinfeld upon the execution of the said contract to the said Nielsen or thereafter, or at any time, executed to said Silver Bell Copper Company by writing signed by him acknowledging or declaring that he held said stock in his name as trustee as aforesaid, or for the purpose aforesaid.

And defendants deny that said Steinfeld paid to himself the said sum of \$2,000 so alleged to have been advanced by him to or for the use or benefit of the said corporation, with or without interest thereupon; and deny that long prior to the 16th day of January,

1904, there was paid to said Mary Nielsen as successor of 893 George or Carl Nielsen, the sum of \$10,000 out of the proceeds of the said mine, together with interest that might be due or owing thereon; and allege that the said Steinfeld paid the said sum of \$10,000 to the said Mary Nielsen out of his own personal funds on or about the 25th of January, 1904; and deny that every and all or any obligation for which said stock is alleged to have been held by said Albert Steinfeld in trust were satisfied or fully performed or that any such trust ever existed; and deny that said alleged trust became or was fully or at all executed so that said 300 shares of stock prior to said 16th day of January, 1904, became the absolute or any property of the said Silver Bell Copper Company without any right, title or interest therein whatever to said Albert Steinfeld; and deny that any of said facts so denied were at all or any times known to defendants Curtis and Shelton or either of them.

Defendants deny that under the circumstances and conditions alleged or set out in the second cause of action in the said 894 third amended complaint contained or in furtherance of the alleged arrangement or conspiracy therein set out, the said Steinfeld caused the directors of the Silver Bell Copper Company to vote to him a dividend on the said 300 shares of stock of \$111 per share or caused the officers of said company to pay said dividend to him; and deny that the sum of \$33,000 or any sum was paid to him as or for such dividend under or by virtue of said alleged arrangement; and deny that the defendants Shelton and Curtis and Steinfeld, as officers of said corporation or in any capacity, or any or either of them, well knew or at all knew that in paying the said Steinfeld the said dividend, they or any of them were violating their trust or obligation as directors or officers of said corporation,

or that said Steinfeld had no right to the same, or that said \$33,000 was the money or property of the said Silver Bell Copper Company, or should not have been paid to any person whatsoever; and deny that before the commencement of this action, or at the time said Steinfeld converted said \$33,000 or any part thereof to his own use or benefit.

895 And for a further and separate defense to that cause of action denominated the second cause of action in the third amended complaint, defendants allege that said cause of action accrued more than two years prior to the commencement of this action.

And for a further and separate defense to that cause of action denominated the second cause of action in the third amended complaint, defendants allege that said cause of action accrued more than four years prior to the filing of the second amended complaint.

And as a further and separate defense to the said second cause of action in the third amended complaint set forth, the defendants allege that the plaintiff and the said Silver Bell Copper Company were guilty of laches in unduly delaying to pay the said Steinfeld the sum of \$2,000 expended by him in the purchase of the said 300 shares of stock, and in offering to assume the obligation incurred by the said Steinfeld to pay the sum of \$10,000 to the said Nielsons.

Wherefore the defendants demand that the plaintiff recover 896 nothing by reason of this action and that the defendants recover their costs against the plaintiff.

FRANCIS J. HENEY,
EUGENE S. IVES,
Attorneys for Defendants.

Verified by defendant Albert Steinfeld.
(Filed January 6, 1908.)

EXHIBIT B.

This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld of Tucson, party of the third, part, witnesseth:

Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and 897 deeds for which property are now in escrow with the Phoenix National Bank of Phoenix, Ariz., and

Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in

the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged it is hereby mutually agreed that the purchase price paid and to be paid
898 upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnify against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company or any other person whatsoever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In Witness Whereof, the said corporations, parties of the
899 first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

(Title of Cause.)

Stipulation.

It is hereby stipulated that all affirmative allegations contained in the answer of defendants to plaintiff's third amended complaint, are for all purposes of this action deemed to be denied by plaintiff, and that plaintiff need not serve or file any replication setting forth or containing such denials.

Dated, Tucson, Arizona, January 7, 1908.

FRANK H. HEREFORD,
EDWIN A. MESERVE,

Attorneys for Plaintiff.

FRANCIS J. HENEY,
EUG. S. IVES,

Attorneys for Defendants.

Filed Jan. 7, 1908.

900

Minute Entries of the Trial Court.

(Title of Cause.)

Be it remembered that heretofore, and upon to-wit: the eighteenth day of May, A. D. 1907, the same being one of the regular judicial days of the April 1907 term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

A jury having been demanded by the defendants herein, it is ordered that this case be set for trial by jury on Monday, September 23, 1907, at 9:00 o'clock a. m.

And afterwards, and upon to-wit:—the fifteenth day of June, A. D. 1907, the same being one of the regular juridical days of the April 1907 term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

In accordance with the stipulation signed and filed herein, 901 it is ordered that the order heretofore made, setting this case for trial by jury on Monday, September 23, 1907, be and the same is hereby vacated; and it is further ordered that this case be and the same is now continued for the term.

And afterwards, and upon to-wit:—the thirtieth day of November, A. D. 1907, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

Comes now Eugene S. Ives, Esq., counsel for the defendants herein, and demands a jury on behalf of the defendants herein.

And afterwards, and upon to-wit:—the same day, the following other order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

A jury having been demanded by the defendants herein, 902 it is ordered that this case be set for trial by jury on Thursday, January 2, 1908, at 9:00 o'clock a. m.

And afterwards, and upon to-wit:—the second day of January, A. D. 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

This matter came on this day regularly to be heard upon the motion of the defendants to make the second amended complaint herein more definite and certain by separately stating the several causes of action therein set forth, E. A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Argument of the respective counsel was had, and this being the usual hour of recess, the further argument of this matter was continued until Friday, January 3, 1908, at 10 o'clock a. m.

903 And afterwards, and upon to-wit:—the same day, the following other order, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

Come now the defendants herein, through their counsel, Francis J. Heney, Esq., and Eugene S. Ives, Esq., and withdraw their demand for a jury herein.

And afterwards, and upon to-wit:—the third day of January, A. D. 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

The motion of the defendants to make the second amended complaint herein more definite and certain by separately stating the several causes of action therein set forth having been continued from yesterday's session of this Court for the purpose of further argument, come now the same parties hereto, into open Court,

904 and further argument of the respective counsel being had, and the matter being fully submitted to the Court, and the Court being fully advised in the premises, it is ordered that said motion be, and the same is now granted on the first ground, to which ruling of the Court the plaintiff, through his counsel, excepts; and it is further ordered that said motion be denied on the second ground, to which ruling of the Court, the defendants, through their counsel, except.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the motion of the defendants to strike out all of Paragraph III of the second amended complaint herein, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants.

Argument of the respective counsel was had, and the matter
905 being fully submitted to the Court, and the Court being fully advised in the premises, does deny said motion, to which ruling of the Court the defendants, through their counsel except.

And afterwards, and upon to-wit:—the sixth day of Janu-ry, A. D. 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

This matter came on this day regularly to be heard upon the motion of the defendants to strike out certain portions of the first cause of action as set forth in the third amended complaint herein, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Argument of the respective coun-

sel was had, and the matter being fully submitted to the
906 Court and the Court being fully advised in the premises, does grant the third ground of said motion, to which ruling of the Court the plaintiff, through his counsel, excepts; and denies the first, second, fourth, fifth, sixth, seventh and eighth ground of said motion, to which ruling of the Court the defendants, through their counsel, except.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the motion of the defendants to strike out certain portions of the second cause of action as set forth in the third amended complaint herein, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Argument of the respective coun-

sel was had, and the matter being fully submitted to the
907 Court, and the Court being fully advised in the premises, does deny said motion, to which ruling of the Court the defendants, through their counsel, except.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the first special demurrer of the defendant, the Mammoth Copper Company, to the third amended complaint herein, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Argument of the respective counsel was had, and the matter being fully submitted to the Court, and the Court being fully advised in the premises, does sustain said demurrer, to which ruling of the Court the plaintiff, through his counsel, excepts.

908 And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

This matter came on this day regularly to be heard upon the second special demurrer of the defendant, the Mammoth Copper Company, to the third amended complaint herein, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Argument of the respective counsel was had, and the matter being fully submitted to the Court, and the Court being fully advised in the premises, does sustain said demurrer, to which ruling of the Court the plaintiff, through his counsel, excepts.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

909 This matter came on this day regularly to be heard upon the general demurrer of the defendants other than the Mammoth Copper Company to the third amended complaint herein, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants. Argument of the respective counsel was had, and the matter being fully submitted to the Court, and the Court being fully advised in the premises, does over-rule said demurrer, to which ruling of the Court the said defendants, through their counsel, except.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

The plaintiff herein electing to stand on the third amended complaint herein as to the defendants other than the Mammoth Copper Company, and declining to amend as to the defendant, the
910 Mammoth Copper Company, it is by the court ordered that this case be and the same is now dismissed as to the defendant, the Mammoth Copper Company, and that the complaint stand as to the other defendants.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This case came on this day regularly for trial before the Court sitting without a jury, a trial by jury having been in open Court expressly waived by the respective parties hereto, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants, and both parties announce ready for trial. Whereupon, by request and consent of counsel for the respective parties hereto, it is ordered that the record of the evidence, admissions and stipulations in the former trial of this case shall constitute the record at this trial, together with such papers as
911 have been filed by the respective parties hereto since the record in the former trial was completed, subject to certain stipulations entered into by the parties hereto, and the plaintiff then rested his case. The defendants then rested their case. Argument of the respective counsel was had, and this being the usual hour of recess, the further trial of this case was ordered continued until Tuesday, January 7, 1908, at 9:00 o'clock a. m., for the purpose of hearing further argument herein.

And afterwards, and upon to-wit:—the seventh day of January, A. D. 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

This case having been continued from yesterday's session of this Court, come now the same parties hereto, and the further trial of the case proceeds as follows:—Further argument of the re-
912 spective counsel was had, and this being the usual hour of recess, the further trial of this case was ordered continued

until Wednesday, January 8, 1908, at 9:00 o'clock a. m., for the purpose of hearing further argument herein.

And afterwards, and upon to-wit:—the eighth day of January, A. D. 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

(Title of Cause.)

This matter having been continued from yesterday's session of this Court, come now the same parties hereto, and the further trial of the case proceeds as follows:—Further argument of the respective counsel was had, and it was by the Court ordered that counsel for the respective parties hereto be granted until Saturday, February 8, 1908, to submit additional authorities herein, and that upon said day this matter be fully submitted to the Court, thereupon to be by the Court taken under advisement.

913 And afterwards, and upon to-wit:—the thirtieth day of July, A. D. 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This case having been tried and argued at a previous session of the present term of this Court, and the written briefs of counsel for the respective parties having been filed herein, and the cause having been fully submitted to the Court, and the Court being now fully advised in the premises,

It is ordered that judgment be entered herein in favor of the defendants and against the plaintiff on the first cause of action, as set forth in the complaint herein.

And it is further ordered that judgment be entered herein on the second cause of action, as set forth in the complaint herein, in favor of the defendant, Silver Bell Copper Company, a corporation, and against the defendant Albert Steinfeld, for the 914 sum of twenty-three thousand three hundred dollars (\$23,300.00), with interest thereon at the rate of six per cent (6%) per annum from the twentieth day of January, 1904.

And it is further ordered that Messrs. Frank H. Hereford and Edwin A. Meserve recover from the defendant corporation as attorneys' fees a sum equal to ten per cent (10%) of the said judgment rendered in favor of the said Silver Bell Copper Company, a corporation.

And the Court does reserve its ruling upon the application for the appointment of a receiver for the said Silver Bell Copper Company, a corporation.

And afterwards, and upon to-wit:—the second day of October, A. D. 1908, the same being one of the regular juridicial days of the April, 1908, Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

It appearing to the Court that an error has been made in
915 the order of judgment entered herein on July 30, 1908, it is
by the Court ordered that said order of judgment be amended
to read as follows:

(Title of Cause.)

This case having been tried and argued at a previous session of the present term of this Court, and the written briefs of counsel for the respective parties having been filed herein, and the cause having been fully submitted to the Court, and the Court being now fully advised in the premises.

It is ordered that judgment be entered herein in favor of the defendants and against the plaintiff on the first cause of action, as set forth in the complaint herein.

And it is further ordered that judgment be entered herein on the second cause of action, as set forth in the complaint herein, in favor of defendant, Silver Bell Copper Company, a corporation, and against the defendant, Albert Steinfeld, for the sum of twenty thousand eight hundred and fifty dollars (\$20,850.00), with
916 interest thereon at the rate of six per cent (6 per cent.) per annum from the twentieth day of January, 1904.

And it is further ordered that Messrs. Frank H. Hereford and Edwin A. Meserve recover from the defendant corporation as attorneys' fees a sum equal to ten per cent. (10 per cent.) of the said judgment rendered in favor of the said Silver Bell Copper Company, a corporation.

And the Court does reserve its ruling upon the application for the appointment of a receiver for the said Silver Bell Copper Company, a corporation."

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the motion of the defendants to make certain additional findings of fact herein, Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., for the defendants. And
917 said motion being fully submitted to the Court without argument, the same was by the Court overruled, to which ruling of the Court the defendants except.

And afterwards, and upon to-wit: the same day, the following other order was *was* had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the motion of the plaintiff for a new trial herein, Frank H. Hereford, Esq., appearing as counsel for the plaintiff and Eugene S. Ives, Esq., for the defendants. And said motion being fully submitted to the Court without argument, and the Court being fully advised in the premises, does deny said motion.

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court *is* said cause, which said order is in words and figures as follows, to-wit:

918

(Title of Cause.)

Comes now the plaintiff herein, through his counsel, and excepts to the ruling of the Court in rendering judgment herein and in overruling the motion of the plaintiff for a new trial herein, and gives notice of appeal to the Supreme Court of this Territory.

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the motion of the defendants for a new trial herein, Frank H. Hereford, Esq., appearing as counsel for the plaintiff and Eugene S. Ives, Esq., for the defendants. And said motion being fully submitted to the Court without argument, and the Court being fully advised in the premises, does deny said motion.

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in
919 said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

Come now the defendants herein, through their counsel, and except to the ruling of the Court in rendering judgment herein and in overruling the motion of the defendants for a new trial herein, and give notice of appeal to the Supreme Court of this Territory.

And afterwards, and upon to-wit: the third day of October, A. D. 1908, the same being one of the regular judicial days of the

April, 1908, term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

By consent of counsel for the respective parties hereto, it is ordered that a stay of execution be granted herein for a period of thirty days from this date.

And afterwards, and upon to-wit: the twenty-fourth day 920 of October, A. D. 1908, the same being one of the regular juridicial days of the April, 1908, term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

Come now the defendants herein and withdraw their exceptions to the item of the plaintiff's cost bill "Copy of evidence as per stipulation of parties, \$541.80," set forth in Paragraph VII of the defendants' Exceptions to Cost Bill, filed hereon on August 18, 1908.

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon the exceptions of the defendants to the cost bill of the plaintiff herein, F. E. Curley, Esq., appearing as counsel for the plaintiff, and S. L. Pattee, Esq., for the defendants. Argument of the respective 921 counsel was had, and the matter being fully submitted to the Court, and the Court being fully advised in the premises, does grant said exceptions except as to the exception heretofore withdrawn on this day.

Stipulation.

(Title of Cause.)

There being no question raised by the pleadings of the relative values of what is known as the "English group of mines" as compared with the remainder of the mines sold on the 20th day of May, 1903, to the Imperial Copper Company, it is agreed that the testimony and reports of W. F. Staunton and Percy Williams shall be stricken out and that the court shall disregard all other testimony relative to relative values, in so far as the question of such relative value is concerned, as justifying the actions of the Board of Direct-

ors and officers of the Silver Bell Copper Company in apportioning or giving to Albert Steinfeld or Albert Steinfeld and the Mammoth Copper Company one-half or any part of the proceeds of the sale above mentioned.

922 Dated Tucson, Arizona, this 2nd day of January, 1908.

EUGENE S. IVES,
FRANCIS J. HENEY,
Attorneys for Defendants.
FRANK H. HEREFORD,
EDWIN A. MESERVE,
Attorneys for Plaintiff.

Filed Jan. 3, 1908.

Stipulation.

(Title of Cause.)

It is hereby agreed that the reporter's transcript heretofore filed is correct, and that the said transcript shall be deemed a transcript of the testimony given at the second trial of this cause, except the testimony and evidence reserved therefrom by stipulation filed January 3, 1908, and that the same may be approved by the Judge accordingly.

EUGENE S. IVES,
Attorney for Defendants.
FRANK H. HEREFORD,
Of Attorneys for Plaintiff.

Filed Nov. 25, 1908.

923

Findings of Fact.

(Title of Cause.)

This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof presiding, sitting without a jury (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises the Court now finds the following facts in the case:

I.

That in the month of January, 1899, the Neilson Mining & Smelting Company, a corporation, was duly and regularly organized under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County of Pima, said Territory; a true copy of its Articles of Incorporation and By-Laws appear in the evidence as exhibits,

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pages 515 and 622, Abstract of Record. That on the 14th day of January, 1901, the name of said corporation was regularly and duly changed to the Silver Bell Copper Company. That said Silver Bell Copper Company is the defendant in the above entitled action and that at all times herein mentioned it has been and is now a corporation, duly organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, said Territory. That at all the times mentioned in these findings subsequent to the 14th day of January, 1901, Albert Steinfeld, J. N. Curtis and R. K. Shelton, have been and now are the directors of said corporation, all of said parties being residents of the City of Tucson, County of Pima, Territory of Arizona.

That plaintiff is now and for all the times herein mentioned has been a resident of the City of New York, State of New York.

925 That the said defendant, the Mammoth Copper Company, is now and for all of the times involved in this action has been a corporation, organized and existing under and by virtue of the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima County, said Territory. That the defendant, Albert Steinfeld, is now and for all of the times mentioned or involved herein, and ever since the organization of said corporation, has been the owner in fact of all of the capital stock of said Mammoth Copper Company and any stock standing in the name of any other party was placed in his name in order to enable such party to qualify as a director and was held by said party for that purpose alone, said stock at all times in fact belonging to and being the property of said Albert Steinfeld. That said Mammoth Copper Company at all times was but an instrument in the hands of the said defendant Albert Steinfeld, used by him for the purpose of transacting certain business for himself that he did not care to transact in his own name; that any money which may on its face have been paid to the defendant, Albert Steinfeld, and any property which may on its face have been delivered to the said

926 Albert Steinfeld for said Mammoth Copper Company, or for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company, in fact and in truth were paid and delivered to the said Albert Steinfeld as his own individual property and were appropriated by him to his own individual use. That all acts and things done in the name of the said Mammoth Copper Company, and all things and property received, given or paid by or to or in the name of said Mammoth Copper Company, were in fact but acts, things and property done, received, given and paid by and to and for the benefit of the said Albert Steinfeld.

II.

That the ownership of the stock of said Nielson Mining & Smelting Company, or the Silver Bell Copper Company, at all times was as follows, viz: upon the organization of said Company, all of the stock of said Company was regularly issued to Carl Nielson, in consideration of the transfer by said Carl Nielsen, to said Company of his rights in the hereinafter mentioned Old Boot or Mammoth

mine, and of the transfer of certain personal property
927 used in working said mine; that immediately thereafter, said stock was divided as follows: 499 shares to and in the name of L. Zeckendorf & Company; 30 shares in the name of Albert Steinfeld, Trustee, being held by him in trust for and as the property of William and Julia Zeckendorf; 170 shares in the name of and belonging to J. N. Curtis; 300 shares in the name of and belonging to Carl Nielson, and 1 share in the name of R. K. Shelton, but belonging to, and the property of L. Zeckendorf and Company; that in January, 1901, the 300 shares of said stock standing in the name of Carl Nielson were transferred on the books of the Company to the name of Albert Steinfeld, Trustee. That on the 6th day of June, 1903, the 499 shares standing in the name of L. Zeckendorf & Company were divided as follows: 250 shares thereof being issued to and in the name of L. Zeckendorf, the plaintiff in this action; 249 shares being issued to and in the name of Albert Steinfeld, said Albert Steinfeld taking unto himself the ownership of the one share still standing in the name of R. K. Shelton, the certificate therefor
928 at all times after being issued being in the possession of said Albert Steinfeld until December 9th, 1903, when, as hereinafter found, the same was given to said R. K. Shelton by the said Steinfeld, said R. K. Shelton then for the first time being put in possession of the certificate for said one share of stock; that the said R. K. Shelton never had any other or different interest in said Silver Bell Copper Company. That at all times and in all meetings of the stockholders of the said company said Albert Steinfeld voted all stock standing in his name as trustee or otherwise, and all stock standing in the name of L. Zeckendorf & Company; that L. Zeckendorf in person or by individual proxy never was at any stockholders' meeting of said company or voted any stock until the stockholders' meeting hereinafter mentioned, held on the 25th day of December, 1903. That at no time prior to June 6, 1903, was plaintiff a stockholder in the Nielsen Mining & Smelting Company or the Silver Bell Copper Company in his own right, but at all the times hereinbefore mentioned the stock issued to L. Zeckendorf & Company stood in the name of and was the property of the copartnership of L. Zeckendorf & Company, and was voted and controlled by Albert Steinfeld as the managing partner of said copartnership, and the said L. Zeckendorf & Company had full and complete knowledge, through Albert Steinfeld, its managing partner, of all of the acts and things heretofore and hereafter found as having been done and performed prior to the 6th day of June, 1903.

III.

That defendant R. K. Shelton at all of the times involved in this action and ever since the incorporation of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, has been and is now but the representative of the said Albert Steinfeld on the Board of Directors of said Company, and at all times involved in this action voted as ordered, directed and requested by said Albert Steinfeld and not otherwise. That as Secretary of said corporation,

said R. K. Shelton at all times did as ordered, directed and requested by said Albert Steinfeld. That for all the times subsequent to June 6th, 1903, said J. N. Curtis as a director and other officer of the said Silver Bell Copper Company was under the complete dominion and control of said Albert Steinfeld and as such director or other officer did whatsoever said Steinfeld requested or directed. At no time and under no circumstances subsequent to June 6th, 1903, did the said J. N. Curtis as director or other officer of the said corporation, do any act, take any step or cast any vote except as requested or directed by the said Albert Steinfeld. That Albert Steinfeld at all of the times involved in this action and mentioned in these findings was in fact in complete control of Nielsen Mining & Smelting Company and of said Silver Bell Copper Company, and in absolute control and direction of its business, property and affairs.

That the power of Albert Steinfeld over the Silver Bell Copper Company, and over the directors and officers thereof up to the month of June, 1903, arose out of the following facts and conditions, viz: the fact that said Company was heavily indebted to L. Zeckendorf & Company, and that L. Zeckendorf & Company and William and Julia Zeckendorf held a majority of the stock of the said company, said Albert Steinfeld as the managing partner of said L. Zeckendorf & Company having the power to control said indebtedness and to vote said stock of said L. Zeckendorf & Company and as trustee of William and Julia Zeckendorf having the power to vote said stock of William and Julia Zeckendorf, and the fact that after January 14, 1901, as trustee of the Silver Bell Copper Company in the ownership of the 300 shares of stock purchased from the Nielsens, he assumed and was accorded by Curtis and Shelton the right and power of voting and did vote that stock.

IV.

That because of the facts herein found, it at all times would have been an idle and useless act for the plaintiff to make any demand whatsoever on the said Silver Bell Copper Company or on its Board of Directors or any of them to bring any action against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton, particularly any action for the recovery of any property of said corporation, or any property claimed to belong to said corporation, or for the payment to said corporation of any debt owing by said parties or either of them, and particularly any action against the said Albert Steinfeld in favor of said corporation to recover any property or to redress any wrong done to said corporation by him, and for said reasons it would have been a useless and idle act for the plaintiff to have demanded of said Board of Directors that this action be brought by the said corporation against the said J. N. Curtis, R. K. Shelton and Albert Steinfeld, and if any action had been brought by said corporation it would not have been prosecuted in good faith nor for a full recovery thereof, nor for the benefit of said corporation or this plaintiff as a stockholder thereof; and for such reasons and because of such facts and because it would have been an idle and purposeless act so to do, plaintiff made no

demand whatsoever on said corporation or on the Board of Directors thereof, that it bring this or any action against said defendants or that it prosecute the same, and plaintiff in bringing and prosecuting this action brought and prosecuted the same as a stockholder of said defendant Silver Bell Copper Company for its use and benefit and in order that its property illegally taken from it, as herein found, might be recovered and restored to its assets.

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V.

That ever since the year 1878 this plaintiff and defendant Albert Steinfeld were partners, doing business in the City of Tucson, under the name of L. Zeckendorf & Company, under the terms and conditions of the articles of partnership and amendments thereto existing between them, which are in evidence and marked exhibits —.

Zeckendorf made visits from time to time to Tucson and upon such visits inspected the business of the copartnership and shared and directed in its conduct, and such was the condition at all times up to and including the commencement of this action; that plaintiff, at all said times, was a resident of the City of New York, State of New York, and said Albert Steinfeld was a resident of the City of Tucson, County of Pima, Territory of Arizona, and that during all of said times said Albert Steinfeld was the General Manager of the said business of L. Zeckendorf & Company and as such was in actual and active control of its business and its business affairs in said Territory, and employed and discharged all of its help

934 and gave and extended all credits and determined its business policy in all matters and things in said Territory of Arizona and in connection with its business therein. That plaintiff attended to and managed the business of said firm in New York, particularly the purchasing of the goods and merchandise handled by said firm.

That for some time prior to the 14th day of January, 1899, William and Julia Zeckendorf were the owners of what is known as the Mammoth, or the Old Boot Mine, being one of the mines herein-after listed and mentioned; that the legal title to said mine stood in the name of Albert Steinfeld, he holding the same as trustee for said William and Julia Zeckendorf. That for some time prior to said 14th day of January, 1899, one Carl Nielsen had a working contract on said mine, executed by said Albert Steinfeld as the ostensible owner thereof, but for the real use and benefit of said William and Julia Zeckendorf, under and by virtue of which said Nielsen was to have the right to operate said mine and to take the ores therefrom and to pay to said Steinfeld, for the use and benefit of said William

935 and Julia Zeckendorf, certain royalties on all ore extracted from said mine. That during the operation of said mine, said Albert Steinfeld, as the manager of said L. Zeckendorf & Company, and in actual control of the business of said partnership, advanced and extended to said Carl Nielsen certain credits, and sold to him on credit large amounts of merchandise, resulting in said Carl Nielsen on and prior to the 14th day of January, 1899, becoming indebted to said L. Zeckendorf and Company in a large sum of money.

That defendant J. N. Curtis, during the time herein last above mentioned, was in the employ of L. Zeckendorf & Company, and in charge of its mines and mining properties, and at all said times took active personal charge of its mines and mining properties and attended to the direction of same and to the sales thereof; and received as his compensation for such work certain pay for his time and certain commissions on sales of mines that might be made by him, or through or under his influence or by his help and assistance.

That on or about the 14th day of January, 1899, in order to protect said indebtedness so owing to said L. Zeckendorf & Company by said Carl Nielsen, said Albert Steinfeld caused the Nielsen Mining & Smelting Company to be incorporated, under the laws of the Territory of Arizona. That thereafter William and Julia Zeckendorf, through the said Albert Steinfeld as trustee, gave an option to said Nielsen Mining & Smelting Company on the said Mammoth or Old Boot Mine, for an agreed price of twenty-five thousand (\$25,000) dollars, to be paid to said William and Julia Zeckendorf in installments of twenty-five hundred (\$2,500) dollars each, to be paid each three months; said Carl Nielsen had previously thereto transferred to said Nielsen Mining & Smelting Company his working contract on said mine above mentioned and also transferred all personal property used on and in connection with said mine and the operation thereof, and said Nielsen Mining & Smelting Company assumed said indebtedness owing to said L. Zeckendorf & Company by said Nielsen, and the same was then charged on the books of said L. Zeckendorf & Company by and on the order and under the direction of said Albert Steinfeld, to the said Nielsen Mining & Smelting Company, and the same was thereafter carried on the books of L. Zeckendorf & Company in the name of Nielsen Mining & Smelting Company (until its name was changed to the Silver Bell Copper Company, and thereafter in such name), and at the same time L. Zeckendorf & Company released said Carl Nielsen from all personal obligation on said indebtedness; that thereupon the stock of the said Nielsen Mining & Smelting Company was divided as heretofore found, the 170 shares which were given to said J. N. Curtis were given to him by L. Zeckendorf & Company as compensation for his services in connection with said transfer and services to be performed by him for said Silver Bell Copper Company. That the directors of said company thereupon elected were said J. N. Curtis, Carl Nielsen and R. K. Shelton; that said Carl Nielsen was elected the nominal general manager and superintendent and J. N. Curtis the president and said R. K. Shelton the secretary of said Company; but at all times thereafter, prior to June 6th, 1903, said Albert Steinfeld, as managing partner of L. Zeckendorf & Company, assumed to be the general manager of said company and assumed the power of directing its affairs and of controlling all of its actions, and said assumption of power on the part of the said Albert Steinfeld was assented to and acknowledged by the said J. N. Curtis, Carl Nielsen and R. K. Shelton, and L. Zeckendorf. That all matte, bullion and other mineral products obtained from the said mines,

which were shipped or sold, were shipped or sold through the firm of L. Zeckendorf & Company and the proceeds thereof received by said firm and credited by it upon the indebtedness to it of said corporation.

VI.

That said Nielsen Mining & Smelting Company, upon said transfers by Nielsen to it being complete and in January, 1899, entered upon the work of the development of said Mammoth or Old Boot Mine, said Carl Nielsen as superintendent being in actual charge thereof. That under said operation, large bodies of ore in said mine were developed and were found to extend to within such a distance of the southern boundary line thereof, being the dividing line between said mine and the Prospector Mine, one of the mines belonging to the English group of mines hereinafter referred to, that it
939 became evident that said ore bodies then developed underneath the ground in said Mammoth Mine ran into said Prospector Mine, and other of said English group of mines, the said facts being ascertainable alone from an examination and inspection of the underground workings of said Mammoth or Old Boot Mine.

That in the year 1900 the said J. N. Curtis on the order and direction of said Albert Steinfeld took up in his own name other mines about and adjoining said Old Boot Mine, all for the use and benefit of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, and the same were carried by said J. N. Curtis thereafter in his own name, but as the property of and for the use and benefit of said Silver Bell Copper Company, said mines being included in the list of mines sold to the Imperial Copper Company as hereinafter found.

VII.

That during all the times herein mentioned those mines known as the English group of mines, being a part of the mines described in Finding XXII and specially so listed therein, surrounded
940 said properties of the Silver Bell Copper Company. That the beneficial ownership of said mines was in certain parties resident in England, from which fact the said mines came to be known as the English group of mines. That one Francis and one Volkert claiming that said mines were open to location had filed locations on the same and were claiming title thereto; that this condition of ownership by said parties continued through the year 1899 and through the year 1900, up to the time of the purchase by Albert Steinfeld, hereinafter mentioned, of what is known as Francis & Volkert titles and the English title thereto. That the Francis & Volkert claims to said mines were initiated on or about the 1st day of January, 1900. That said Mammoth or Old Boot Mine, during the fall of the year 1899 and up to the time of the closing of said mine in the spring of 1900, was being worked at a substantial profit. That at said time said Nielsen Mining & Smelting Company was indebted to said firm of L. Zeckendorf & Company in an amount approximating thirty thousand dollars (\$30,000.00) over and above

the value of all matte and bullion then on hand or in transit,
941 for moneys which had been advanced by said L. Zeckendorf
& Company to said Nielsen Mining & Smelting Company, to
enable it to develop and open up said mine and to buy machinery,
mills and other property necessary for the working of said mine and
the handling of ores taken therefrom, and also for certain goods,
wares and merchandise sold by said L. Zeckendorf & Company to
said Nielsen Mining & Smelting Company.

VIII.

That in the fall of 1899, said J. N. Curtis, the then President of
said Nielsen Mining & Smelting Company, advised and informed
said Albert Steinfeld that the developments of said Mammoth Mine
showed that the ore bodies therein, (the same being underground
and undeveloped and, except as thus shown, unknown) would run
into said Prospector Mine and other mines belonging to said Eng-
lish group of mines, and that said underground workings of said
Mammoth Mine showed that there were probably great values in
said English group of mines: That at about the same time said

Albert Steinfeld became dissatisfied with the management
942 of said Carl Nielsen and with his work as superintendent and
general manager of said mine; and thereupon and in the
month of December, 1899, said Albert Steinfeld, without action
of or authority from the Board of Directors of said Company, as-
sumed to and did discharge said Carl Nielsen as general manager
and superintendent of said mine, notwithstanding that he had been
elected by the Board of Directors of said Company; and at the same
time ordered said Mammoth Mine to be closed down and all work
therein to be stopped, as soon as the coke and ore on hand should
be used up. His controlling purpose in so doing being to obtain
from Nielsen for the corporation the ownership of the said 300
shares of stock then owned and held by him, and in order that the
English group of mines, so-called, and the Francis-Volkert titles
thereto might be purchased at a nominal or small sum, without the
owners thereof obtaining knowledge through the workings of said
Mammoth Mine and the showing of ore bodies therein, that said
ore bodies probably did and would extend into said English group
of mines; and said mine was not shut down because said
943 mine could not have been worked at a profit, for the same
could have been worked at a substantial profit; and that all
of the said acts and purposes of said Steinfeld were communicated
by him to the said L. Zeckendorf at the time the said acts were done
or the said purposes formed.

IX.

That said J. N. Curtis as the President of said Nielsen Mining &
Smelting Company, prior to said time, had frequently advised and
notified said Albert Steinfeld, and said Albert Steinfeld at all times
had known, and said Zeckendorf had been told and informed by
said Steinfeld that it was very desirable that said English group of

mines, so-called, should be purchased, in order that all of the mines and mining claims surrounding said Mammoth Mine should with it constitute one group, and in order that the whole thereof might be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth Mine, soon ascertain that the ore bodies therein probably extended into said English group of mines; and because of the fact that all purchasers
944 of large mining properties desire to control all claims immediately surrounding any developed mine or mines.

That said Albert Steinfeld, before ordering said mine to be closed, and work thereon to be stopped, visited said mine and examined the same, and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in said mines and their tendencies, as above found and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Finding XXII could or might be sold as one group and one property. That said Albert Steinfeld acquired said information because of the fact that he was acknowledged and conceded to be the actual manager of said Nielsen Mining & Smelting Company, and because of his assumption of such power and of such position, and that he acquired said knowledge and information solely from said J. N. Curtis, the President of the Nielsen Mining & Smelting Company, and from a personal examination of said mine made by him as such assumed and
945 acknowledged actual manager of said company. That said Nielsen being discharged as said superintendent and manager, the personal control of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the President of said Nielsen Mining & Smelting Company.

X.

That under date of the 16th day of May, 1900, said Steinfeld entered into an agreement in writing with the said Francis and Volkert, said agreement being hereafter set out in full in Finding XVII attached to and as a part of the July 15, 1901, proposal or option. (Ex. 137.)

That thereafter and in pursuance of said agreement the interest of said infant children was conveyed to said Mammoth Copper Company for said Steinfeld, and he paid the said sum of \$625 therefor; that the said sum of \$1,875 and \$625 so paid by said Steinfeld, were the personal money of said Steinfeld.

XI.

That on or about the 29th day of June, 1900, said Albert Steinfeld purchased from the said Carl Nielsen the said three hundred (300) shares of stock belonging to said Carl Nielsen,
946 and purchased from said Carl Nielsen and one Lewis two certain mines they had and all mines and mining claims that said Carl Nielsen might have in the mining district in which were located said Mammoth, or Old Boot Mine, said mining district being known

as the Silver Bell Mining District. That the purchase price paid and agreed to be paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2,000) dollars cash then paid, and the sum of ten thousand (\$10,000) dollars, agreed to be paid out of the proceeds of the working of said Old Boot or Mammoth Mine, or the proceeds of the sale of said mine, in the event the same should be sold before said sum should be paid out of the proceeds derived from the working of said mine: That said contract, on the direction of the said Albert Steinfeld, was signed by himself individually and by said Nielsen Mining & Smelting Company. That said sum of ten thousand (\$10,000.00) dollars on January 24, 1904, was paid by said Steinfeld, to Mary Nielsen, the successor of Carl Nielsen, and one of the parties to said contract: That said Albert Steinfeld took said 300 shares of stock in his name as "trustee" and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company said Silver Bell Copper Company during all such times and now being the equitable and real owner thereof.

XII.

That said Albert Steinfeld, after closing down said mine and after purchasing said Nielsen stock and interests and mines and said Francis and Volkert interests, proceeded in September, 1900, to England and there concluded the purchase of the English titles to said English group of mines, including the purchase of the equitable, as well as the legal, title thereto, paying therefor the sum of five thousand (\$5,000.00) dollars. That said sum of \$5,000 (five thousand) so paid for said English group of mines, and said sum of twenty-five hundred (\$2,500.00) dollars paid to said Francis and Volkert, were amounts very much less than said mines could probably have been purchased for, if the owners of said English titles to said group of mines and said Francis and Volkert titles thereto, or either, had become possessed of the knowledge which said Albert Steinfeld had acquired, as hereinabove found, of the tendency of the ore bodies in said Mammoth or Old Boot Mine.

XIII.

The said Steinfeld in purchasing the said English group of mines from the said Francis and Volkert and from the said English owners did not purchase the same with the then intent that thereby they should become and be the properties of the Silver Bell Copper Company but at the times of the said purchases the said Steinfeld intended to take the properties as his own, but with purpose to offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would be and had been put to in acquiring the same, and said Steinfeld expected that the said Silver Bell Copper Company would take over the said properties, the said Steinfeld intending on his part that in the event the said corporation did not take over the said properties and so reimburse him he would keep said properties for and as his own.

XIV.

That after acquiring said Francis and Volkert titles to said mines, and prior to his going to Europe, said Albert Steinfeld directed that the said Mammoth or Old Boot Mine be again put in operation and again worked, and thereupon and thereafter it and the adjoining mines as one property were worked and operated by said Silver Bell Copper Company. That by the time said mine was reopened the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot Mine and adjoining mines were very much less than at the time said Old Boot mine was closed down by Steinfeld in the spring of 1900 as above found.

That in January, 1900, said Steinfeld caused the development work upon said mine to be stopped; the smelter, however, was run until some time in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and substantially all the ore which had been developed prior thereto, were exhausted, and that if said development and not been stopped by said Steinfeld but had been continued during the operation of said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied, and in consequence thereof said Silver Bell Copper Company sustained great damage.

XV.

That in the early part of 1901, the question as to the ownership of the 300 shares of stock purchased from Nielsen by Steinfeld and of the English group of mines arose between Steinfeld and Curtis as president of the Silver Bell Copper Company, Steinfeld claiming the absolute ownership of both the shares of stock and of the mines, and Curtis claiming that Steinfeld held the same in trust for the company. Curtis thereupon consulted S. M. Franklin, the company's attorney, and was advised by Franklin that Steinfeld held both the stock and the mines as the trustee for the corporation, and Steinfeld was so advised. That upon receiving this advice

951 Steinfeld demanded of Curtis that interest be paid to him by the company on the sums of money expended by him in the purchase of stock and of the mines, as is evidenced by a letter written by said Steinfeld to Curtis, dated May 19, 1901. Curtis, as the treasurer of the company, signed checks for such interest and sent them to Steinfeld. After the receipt of such checks by Steinfeld he consulted with said Franklin as to his rights; he was advised by Franklin that because of his relations with the company, he had no legal right to make the purchases for his own benefit; but, on the other hand had no right to compel the company to assume such purchases; that it was his duty to give to the company an opportunity at a meeting of the stockholders at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares within a reasonable time to reimburse him for his outlays, and to take over the property if he so desired; and that if the company should not avail itself of his offer,

Steinfeld could then hold the properties as his own. After receiving said advice Steinfeld returned the checks for the interest to Curtis.

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XVI.

That in the year 1900, immediately upon acquiring said two mines from said Nielsen and Lewis and the said English group of mines, said Steinfeld, as the same were acquired, turned same over to the possession of the said Nielsen Mining & Smelting Company, and said Nielsen Mining and Smelting Company thereupon assumed the possession and control thereof.

That said J. N. Curtis, as president of said Silver Bell Copper Company, upon and after said mines were turned over as aforesaid to said Silver Bell Copper Company from time to time prepared various maps for and under the direction of said Albert Steinfeld, showing all of said mines named in Finding XXII as one property and one entire group of mines, and as the mines and properties of said Silver Bell Copper Company; and said J. N. Curtis, as president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, from time to time prepared various reports of "all of the properties of said Silver Bell Copper Company" and included
953 in said reports all mines mentioned in Finding XXII without in any manner segregating or separating the same into groups, and as being properties of said Silver Bell Copper Company.

XVII.

That under date of July 15th, 1901, in order to bring the matter of the purchase of the properties hereinbefore referred to formally before the stockholders of the company for action, said Albert Steinfeld delivered to the secretary of said Silver Bell Copper Company a document or proposal dated of said date in the words and figures following, viz:

"TUCSON, ARIZ., *July 15th, 1901.*

"Silver Bell Copper Company (formerly Nielsen Mining and Smelting Company), Tucson, Arizona.

GENTLEMEN: On May 16th, 1900, I entered into a contract with Margaret Francis and Julius Volkert in regard to certain mining claims and mill sites situated in the Silver Bell Mining district, Pima County, Arizona, claimed by them and which are
954 situated either adjoining or near to the Mammoth mine, or better known as the Old Boot mine, which is being operated by your company, a copy of which agreement is hereto annexed.

In pursuance of this contract I have caused to be conveyed to the Mammoth Copper Company, the corporation mentioned in the agreement, all the interest of the said Margaret Francis and Julius Volkert as well as the interest of the minor heirs of John Francis, deceased, and in consideration therefor, I have received the following, to-wit:

1. Nine hundred and ninety-seven shares of the full paid up and non-assessable stock of the said Mammoth Copper Company, being

all the shares of the capital stock of that corporation, except the three shares held by its directors.

2. The promissory note of said corporation dated June 8th, 1900, payable to my order one year from date for the sum of \$2,780, with interest thereon from its date until paid at one per cent per month.

955 3. The promissory note of said corporation, dated June 8th, 1900, payable to my order or demand, for \$12,500 with interest from demand at the rate of one per cent per month.

4. A mortgage executed by said corporation on all said mining claims and mill sites, as security for the payment of said two promissory notes.

5. The written agreement of said corporation, dated June 8th, 1900, wherein it agrees to do and perform all the matters and things by me agreed to be done and performed in the said contract of date May 16th, 1900, a copy of which agreement of date June 8th, 1900, is hereto annexed.

The first mentioned promissory note being for the payment of the sum of \$2,780.00, represents the actual amount of money paid by me to Margaret Francis, individually and as guardian for her children, and to Julius Volkert for their deeds to the mining claims and mill sites mentioned in their agreement, to-wit: \$2,500.00 for the deeds and \$280 or thereabouts for legal and other expenses in connection therewith.

956 The other promissory note being for \$12,500, is held by me as security for the payment of said Mammoth Copper Company of the sum of \$12,500 provided to be paid to said Francis and Volkert when said mines are sold in accordance with the agreement of May 16, 1900, and as security for the faithful performance on the part of said company of their agreement to me of date June 8th, 1900.

I herewith submit for your inspection the originals of said agreements, notes, mortgages and deeds.

2.

Certain of the mining claims mentioned in the agreement of May 16, 1900, were claimed under different locations by the other claimants, and by the terms of that agreement I was obligated either to acquire such adverse locations and claims by purchase, or to litigate the same.

In order to fulfill the obligations imposed upon me in this regard, it became necessary for me to go to England to see some of the adverse claimants. This I did in the summer of 1900. After
957 considerable negotiations I obtained the deed on the English claimants, Frederick Clark Beckwith, and the Tucson Mining and Smelting Company, Limited, a British corporation, and also of Herbert B. Tenny of Tucson, which deed was dated August 21st, 1900, and conveyed to me the following mining claims situate in said Silver Bell Mining district, to-wit: Page, Southern Beauty, Silver Bell, Confidence, Union, Emerald, Comet, Prospector, Florence, Imperial and Yankee.

The amount of costs and expenses by me in the negotiation and in acquiring said deed was as follows:

Purchase price, \$5,815.63.

The expense of trip, attorneys' fees and incidentals, \$2,668.51, all of which sums were expended by me on or about August 21st, 1900.

I now hold in my own name all the mining claims so conveyed to me by such deed.

3.

On June 29th, 1900, I obtained from Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis, their deed conveying to me the 958 Clarence mining claim, situate in said Silver Bell mining district, and also, "all their right, title and interest in and to all mining claims, mill sites and property situate in said Silver Bell mining district, the legal or equitable or record title to which is now in either the Nielsen Mining and Smelting Company, a corporation or in the Mammoth Copper Company, a corporation, or in the Tucson Mining and Smelting Company, a corporation, or in Frederick Clark Beckwith, or in Julius Volkert or John Francis, or in the heirs, distributees or estate of said John Francis, deceased, or in J. N. Curtis, or in Herbert B. Tenny, or in said Albert Steinfeld." This deed is of record in the office of the county recorder of Pima County, in Book 22, of Deeds to Mines, on pages 508 and 509, reference to which is hereby made.

For this deed I paid to the grantors on the 3rd day of July, 1900, the sum of \$2,000 and I now hold in my own name, all the mining claims so conveyed to me.

In this connection, I will further state that on June 29th, 1900, the Nielsen Mining and Smelting Company, by J. N. Curtis, 959 its president, and myself, as parties of the first part, and Mary Nielsen and Carl Nielsen as parties of the second part, entered into an agreement, the original of which is in possession of yourselves. At the time of the execution of this agreement I personally paid to said Nielsens out of my own money, the sum of \$2,000, which was in payment of the quit-claim deed executed to me by them and Lewis, above referred to; and it was at the same time agreed by Mr. J. N. Curtis, your president and myself, that the three hundred shares of stock assigned to me by the Nielsens should be held by me in trust until the purchase price thereof, to-wit: Ten thousand dollars was paid by the Nielsen Mining & Smelting Company, as per the agreement, when said shares should be assigned by me to your company.

4.

I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same, and as an inducement to you to purchase and acquire the same, I am willing to place you in 960 my shoes, that is to say, to sell and convey to you all the interest so acquired by me, upon my being repaid the amounts

of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me the performance on your part, of all the matters and things and payments which under the various contracts I am liable or responsible for. To this end I herewith submit to you the following proposition:

5.

Proposition.

If you will repay to me, on or before the 15th day of October, 1901, the sum of money I have expended and expenses incurred, as above set forth, with interest thereon from the dates of such respective expenditures up to the 15th day of October, 1901, at the rate of 1 per cent per month, and aggregating the total sum of fifteen thousand, one hundred and ninety-two dollars and forty-five cents, being the aggregate of the following items, to-wit:

June 8th, 1900, paid Francis and Volkert and expenses,
\$2,780.00.

961 Interest on above, \$451.75; total, \$3,231.75.

August 21, 1900, paid for deed Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney, and expenses, trip to Europe to obtain same, and other expenses connected therewith, \$8,481.14.

Interest on same to October 15th, \$1,166.56.

June 29, 1900, paid to the Nielsens and Lewis for their deed, and expenses connected therewith, \$2,000.

Interest on same to October 15th, \$310; total, \$15,192.45 and if you will on or before the said 15th day of October, 1901, and at the same time that the said repayment is made to me, duly agree in writing to do and perform the annual assessment work required to be done on all mining claims, and pay or repay for the annual assessment work required to be done thereon for the years 1900 and 1901, and further agree to assume and perform all the matters and things agreed to be done by me, or assumed by me in my said agreement with said Margaret Francis and Julius Volkert of date

May 16, 1900, and further save and keep me harmless from
962 any loss or expense by reason of my having entered into said agreement:

Then I will agree as follows:

First. Immediately to cancel as paid said note for \$2,780, executed to me by said Mammoth Copper Company, and thus extinguish said obligation.

Second. To hold all of said 997 shares of the capital stock of said Mammoth Copper Company, and to hold the \$12,500 promissory note and mortgage executed by said company, and to hold all the mining claims and mill sites conveyed to me by said Frederick Clark Beckwith, Tucson Mining and Smelting Company, Limited, and Herbert B. Tenney, by their deed dated August 21, 1900; and the mining claims and the mill sites conveyed to me by said Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis; and to hold the 300

shares of the capital stock of the Nielsen Mining & Smelting Company (now the Silver Bell Copper Company) as trustee for your company, subject to the following trusts and conditions, to-wit:

1. That upon your complying and performing the matters and things by you agreed to be done and performed according to the terms of the written agreement which hereinabove is provided you shall execute to me, that is to say, upon your doing all the matters and things by me agreed to be done and performed under my agreement with said Francis and Volkert of date May 16th, 1900, and upon your paying to them or their assigns the sum of \$12,500 as in said agreement is provided, or procuring their release from said payment; and also paying to said Carl Nielsen and Mary Nielsen, his, her or their assigns, or personal representatives, the sum of ten thousand dollars as agreed to be done by our joint agreement with them of date June 29th, 1900; then and in such event I will transfer and assign to you absolutely all of said shares of stock, both said 997 shares of stock of the Mammoth Copper Company and the 300 shares of the Nielsen Mining and Smelting Company; and I will cancel their promissory note for \$12,500 and satisfy on record the said mortgage given as security therefor; and I will convey to you absolutely all the right, title and interest acquired by me under the said deeds executed to me by said
963
964 Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney and under the deed executed to me by Mary Nielsen, Carl Nielsen and L. B. Lewis.

2. That in the event you fail to carry out your said agreement with me to do and pay for the annual assessment work upon said mining claims, or to make either said payment of \$12,500 or said payment of \$10,000, respectively, as above provided or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute to me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay me, as aforesaid, and I am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims, and mill sites described in said deed to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatsoever, equitable or otherwise, thereto or therein.

I hereby give you until the 15th day of October, 1901, to
965 accept this proposition and to pay me the said sum of \$15,-
192.45 to me, and to execute the written agreement above provided for; it being distinctly understood that if you fail to pay me said sum of \$15,192.45 and execute said agreement to me on or before said 15th day of October, 1901, then this proposition and option to you is ended and in that event I shall hold all said shares of stock in the Mammoth Copper Company, and all said mining claims aforesaid, individually and for my own benefit. The 300 shares of stock in the Nielsen Mining and Smelting Company (now the Silver Bell Copper Company), however, I will in any event continue to hold under our joint agreement with the Niensens in regard

thereto, unless you wish to disaffirm the said agreement as made by your president in regard thereto.

Yours truly,

ALBERT STEINFELD."

That attached and made a part of said document were the following contracts, viz: The contract known as the Nielsen agreement and described in the evidence herein and set out in full being Exhibit No. 44. And the contract contained in the evidence herein and known as the Francis and Volkert agreement, attached to and being the latter part of Exhibit No. 137.

That said document had been prepared by S. M. Franklin, the attorney for said Silver Bell Copper Company, for the purpose of bringing the question of said Steinfeld's actions in purchasing said mines and properties before the stockholders of said company; but in making and in presenting the said proposition the said Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duties to the said company.

That said document was presented to the Board of Directors of said company on the 15th day of July, 1901, at which the said proposition was ordered filed; and at which meeting it was resolved that a meeting of the stockholders should be called to decide whether said proposition should be accepted or rejected. That no such meeting, as above found, was called or held.

That on October 1, 1901, a meeting of the directors of said company, namely, Steinfeld, Shelton and Curtis, was held, at which the following took place:

"Mr. Albert Steinfeld stated he would agree, in consideration of this company performing and paying for the assessment work done and to be done, for the years 1900, 1901, and 1902, upon all of the mining claims mentioned and described in his communication to this company of date July 15th, 1901, to extend the time within which this company has the right to accept his said proposition and to pay the amounts of money required by it to be paid if the proposition is accepted, from October 15th, 1901, the date mentioned in said communication, until the 15th day of September, 1902; provided, however, that upon said 15th day of September, 1902, this company not only pay to him the amount of money called for in said communication, to-wit: \$15,192.45, but also to pay him the interest from October 15th, 1901, until the 15th day of September, 1902, at the same rate as is set forth in said communication.

On motion duly seconded it was unanimously resolved that the foregoing proposition of Mr. Steinfeld be accepted and that the president of this company be and he is hereby authorized to do, perform and pay for the annual assessment work for the years 1900, 1901, and 1902, upon the mining claims mentioned in the communication of Mr. Albert Steinfeld of date July 15th, 1901, and further

Resolved, That the meeting of stockholders authorized and directed by the resolution of this board heretofore adopted, to be called by the president for the purpose of considering the proposition of

Mr. Steinfeld on date of July 15th, 1901, be called by him on a day not later than the 15th day of September, 1902."

That a stockholders' meeting was thereafter held on said October 1st, 1901. L. Zeckendorf was not then in Tucson. No action whatever with reference to said proposition was taken and no such meeting as that so ordered to be called was ever called or held. That the matter of the acceptance or rejection of said offer did not again come before either the directors or stockholders of said company and no corporate action was taken thereon until the meeting of the
969 directors held under date of May 20th, 1903, hereinafter found and set out. That at all times after July 15, 1901, the Silver Bell Copper Company continued, as it had since November, 1900, to possess, work and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company.

XVIII.

That neither said Albert Steinfeld nor said Mammoth Copper Company at any time after July 15, 1901, made or asserted any claim to or any right in any of said mines or property, except such as are recited in the minutes of the meetings of the directors of the Silver Bell Copper Company.

That plaintiff knew nothing of said proposal or of the facts concerning the purchase of said mines, properties or stock, and of the prices paid therefor, or of the circumstances surrounding the same until long after May 20th, 1903, except the plaintiff knew that
970 said Steinfeld had, during the year 1899, and the early part of the year 1900 reported to plaintiff that the purchase of the same was desirable and should be accomplished and that said Steinfeld intended for the company to acquire the same, and further that when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same.

XIX.

That in the month of March, 1901, said Albert Steinfeld called upon said J. N. Curtis to prepare a written report of "the mines and mining properties of the Silver Bell Copper Company," and that on the 24th day of March, 1901, pursuant to said request, said J. N. Curtis, as the president of said Silver Bell Copper Company, delivered to said Albert Steinfeld a written report and statement, particularly describing the properties of the Silver Bell Copper Company, in which written report he, the said J. N. Curtis, included by description as the property of the Silver Bell Copper Company, all of the said English group of mines and other mines mentioned in Find-
971 ing XXII, but without in any manner segregating or grouping the same; that said Albert Steinfeld, in said month of March and in the month of April, 1901, circulated said written report and delivered copies thereof to various and different people and, over his signature, to this plaintiff as being a correct report

of the mines and mining properties belonging to said Silver Bell Copper Company; and that thereafter and at various and different times said Albert Steinfeld furnished to this plaintiff written reports over his signature of the properties belonging to said Silver Bell Copper Company.

That Albert Steinfeld did not at any time prior to the purchase from the English owners of their title to the English group of mines make any direct or express promise or representation to the Nielsen Mining and Smelting Company or the Silver Bell Copper Company or to any officer or director of said company, that he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines or the title of the English owners to the English group of mines for the use or benefit of the said company.

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XX.

On April 3, 1903, said Albert Steinfeld wrote a certain letter to one G. A. Beaton, giving him an option upon *and*, whereby he agreed that he would convey or cause to be conveyed for the sum of \$515,000 all of the said properties as one certain property, including therein all mines and properties standing in the name of J. N. Curtis, Albert Steinfeld and of said Mammoth Copper Company in said Silver Bell mining district, which in addition to the mines standing in the name of said Silver Bell Copper Company would include the mines standing in the name of said J. N. Curtis, and the said English group of mines standing in the name of said Albert Steinfeld and said Mammoth Copper Company and said two mines so purchased from said Nielsen & Lewis standing in the name of said Albert Steinfeld. That at the time said price of \$515,000 was fixed for said entire properties, said Steinfeld intended to renew and permit the corporation to accept the terms of the proposition dated July 15, 1901 as extended on October 1st, 1901, and the officers of

said Silver Bell Copper Company expected the corporation to
973 avail itself of said offer so that the whole of said price would be paid to and become the property of said Silver Bell Copper Company. That on the 13th day of May, 1903, said Albert Steinfeld formally reported to the board of directors of said Silver Bell Copper Company in session, that he had made or given on behalf of himself and the Mammoth Copper Company and of the Silver Bell Copper Company a written option to George A. Beaton of New York City and his assigns, for the sale amongst other things of all the property rights, interests and assets of the said Silver Bell corporation; and requested that his action in so doing be confirmed, and thereupon and upon such request, he voting therefor his action in giving said option for said purchase price was confirmed. That the option to said Beaton was taken by him for the Imperial Copper Company and the sale thereafter consummated to the Imperial Copper Co. to all of the properties described in Finding XXII was, under and by virtue of said option and for the purchase price of \$515,000 named therein.

XXI.

That negotiations for and concerning said sale were continuous from the time of the giving of said option to said Beaton down to and including the 20th day of May, 1903. That said Albert Steinfeld personally conducted said negotiations, by and on behalf of said Silver Bell Copper Company, with said Imperial Copper Company and said Beaton and the attorneys of said Imperial Copper Company, and caused S. M. Franklin, his personal attorney and the attorney for said Silver Bell Copper Company to take part in said negotiations and to assist in the preparation of all contracts and papers, and to do other work in connection with said sale, said S. M. Franklin during all said negotiations acting as the attorney for said Silver Bell Copper Company, on the direction of said Steinfeld.

XXII.

That said sale was consummated on May 20, 1903, and the mines and mining properties sold to the Imperial Copper Company on the 20th day of May, 1903, were the following:

Mammoth or Old Boot, Copper, Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F. Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, and Enterprise:

That of said mines, the following named mines were those which were known as the English group of mines, namely:

Herbert, Confidence, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Enterprise.

XXIII.

That pending said negotiations the representatives of the Imperial Copper Company demanded as a condition to the carrying out of said sale that Albert Steinfeld and the Silver Bell Copper Company should guarantee the titles to said properties and that said Steinfeld did, in pursuance of said demand and insistence of said representatives of the Imperial Copper Company, sign and cause the said Silver Bell Copper Company to sign a document, being defendants' "Exhibit KK."

XXIV.

That under date of 20th day of May, 1903, all of the properties listed and described in the schedule "Exhibit A" attached to plain-

tiff's complaint and amended complaint on file herein, were sold to the Imperial Copper Company for the purchase price of \$515,000.00. That the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company joined in the deed of conveyance of said properties: That said purchase price of \$515,000.00 under the terms of the sale thereof, became payable as follows, to-wit: \$115,000.00 in cash on said 20th day of May, 1903, and \$40,000 in four equal payments of \$100,000 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of said
 977 payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the said Silver Bell Copper Company, each of said notes being dated the said 20th day of May, 1903, and bearing interest from said date of payment thereof, at the rate of six (6) per cent. per annum; that the sum of \$115,000.00 in cash was paid by said Imperial Copper Company to and received by said Albert Steinfeld, as the treasurer of the said Silver Bell Copper Company; that the said four promissory notes, each for \$100,000.00 principal, as aforesaid, were delivered to and received by the said Albert Steinfeld, as treasurer of the said Silver Bell Copper Company, and said cash and notes were to be held by said Steinfeld pursuant to the agreement of May 20, 1903, in the next finding set forth.

XXV.

That on the said 20th day of May, 1903, after the said sale was completed, the said Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company, executed an agree-
 978 ment in writing, in the words and figures following, to-wit:

"This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phenix National Bank of Phenix, Ariz., and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

979 "Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be

sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

"Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld, as trustee, 980 and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said Company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

"In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

That the terms of this agreement, and that it should be executed, were, however, all orally agreed upon before the said sale was completed, or said money was paid, or said notes executed by the 981 said Imperial Copper Company.

XXVI.

That after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company, paid two of said promissory notes, paying the principal thereof, with the interest at said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of the cash paid to the said Silver Bell Copper Company, by said Imperial Copper Company, prior to January 1st, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said "Exhibit A" of the sum of \$319,487.50; that the said sums of money aggregating the said sum of \$319,487.50, were received by the said Silver Bell Copper Company from the Imperial Copper Company, as and for the first cash payment, and as the payments of the two promissory notes first falling due on the purchase price of said sale so made to said Imperial Copper Company. That of said sum there was regu-

982 larly paid out for and on account of certain debts and con-
tracts of the Silver Bell Copper Company, a total of \$118,-
000.00, including the sum of \$18,117.00 paid to Albert Stein-
feld May 21st, 1903.

XXVII.

That after the conclusion of said sale to said Imperial Copper Company, and after all papers had been delivered in connection with the said sale and the negotiations in connection therewith, and on May 20, 1903, the board of directors of said Silver Bell Copper Company convened; the following are the records of the minutes of said meeting, viz.:

"A meeting of the directors of the Silver Bell Copper Company was held at the office of the company in Tucson, Arizona, on May 20, 1903, at 4 o'clock p. m., pursuant to call of the President.

Present: J. N. Curtis, President; Albert Steinfeld, Director, R. K. Shelton, Director.

The President reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all the mining claims of this company in
983 the Silver Bell Mining District, Pima County, Arizona, and all the machinery, plant and personal property used there-
with; also all of the mining claims and personal property used there-
with, of the Mammoth Copper Company, as well as certain other mines or interests therein which stand in the name of Albert Steinfeld, and in the individual name of the President, and to pay there-
for the sum of \$515,000, as follows: the sum of \$115,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, Treasurer; and the balance, \$400,000 in four equal installments of \$100,000, each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent per annum; and for which deferred payments said company executed to this company its four promissory notes, which now are also in the hands of the Treasurer.

He further reported that the necessary deeds and agreement had been executed by the President and Secretary of this Company and amongst others a Guarantee Agreement which Guarantee Agreement was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld, individually. The said agree-
984 ments were read and considered.

He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company had again submitted for acceptance, the proposition which he had heretofore submitted in writing on July 15th, 1901, with the modifications, however, that this company shall pay to him forthwith in cash, the sums of money which in said proposition were required to be paid on

October 15th, 1901, to-wit: the sum of \$15,192.45, and also shall forthwith pay in cash, interest thereon from October 15, 1901, to this date at the rate of 1 per cent per month amounting to \$2,924.55, making a total of \$18,117.00 and that this company shall also assume and pay all obligations, which he said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company, and keep him
985 free and harmless from any and all expense and loss, which may arise to him by reason of any claim or asserted claim, of any person whatsoever, for or on account of, or arising out of or connected with the present sale, and negotiations, or any present negotiations or transactions, in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy, the commissions which he, said Steinfeld agreed to pay to said Murphy, to-wit: the sum of \$25,000, said agreement being made for and on behalf of this company; and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one, J. M. Burnett, for commissions.

Also that this company shall indemnify him against loss, damage or expense, by reason of his having guaranteed the titles to the mining claims sold, or agreed to be sold, to said Imperial Copper Company, as is set forth in the Guarantee Agreement heretofore submitted to this meeting.

The President also stated that it was necessary to adjust with the Mammoth Copper Company, the disposition that was to be
986 made of the purchase money upon the sale; He then submitted the agreement between this company, the said Mammoth Copper Company and Albert Steinfeld on this point and also covering the matter of guarantee:

After a full consideration the following resolutions were unanimously adopted, to-wit:

Resolved, That all the acts of the President and Secretary of this corporation, and all papers, agreements and deeds signed by them, for or on behalf of this corporation in the matter of the negotiation and sale of this Company's property to the Imperial Copper Company, be, and the same hereby are ratified, approved and confirmed.

Resolved, That the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he (said Steinfeld) be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen (18,117) dollars, and that out of the first moneys received by this Company upon the promissory notes of the Imperial Copper Company, he, said Steinfeld, as Treasurer of this Company, shall retain sufficient moneys to pay
987 the amounts necessary to be paid to Margaret Francis and

Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Nielsen (he being now deceased) and to Mary Nielsen, the amount necessary to be paid under the agreement with said Niensens aforesaid; and when said amounts respectively become due, to pay the same to the parties entitled thereto.

Resolved, That Albert Steinfeld as Treasurer of this Company

be, and he is, hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

Resolved, That the President and Secretary of this corporation be, and they hereby are, authorized, empowered and directed, in such manner and form, as they deem necessary or proper, to indemnify said Steinfeld, against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper

Company; and that he, and they hereby are, authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents or other writings, which they deem necessary in the premises.

Resolved, That the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld be, and the same is, hereby ratified, approved and confirmed.

The minutes of this meeting were then read and after first being amended by striking out lines 1 to 16, both inclusive, on page 46 of this book, and striking out part of line 21 and all of lines 22 and 23, on the same page, the same were on motion approved as amended.

On motion the meeting adjourned, subject to the call of the President.

J. N. CURTIS, *President*,
ALBERT STEINFELD, *Director*,
R. K. SHELTON, *Secretary*."

XXVIII.

That in the months of October and November, 1903, said Albert Steinfeld sent all said money and notes, except \$50,000.00 which had theretofore been attached in a suit by S. M. Franklin, to the California Bank in San Francisco, and deposited the same in said Bank in his individual name. Plaintiff brought an action in the city and county of San Francisco, state of California, against said Albert Steinfeld and said Bank. Defendants' Exhibit "J" is a copy of the complaint in said action. Plaintiff obtained an injunction therein restraining Steinfeld from receiving and said Bank from delivering to him said money or notes.

XXIX.

That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500, and in said action garnished the sum of \$51,500, as the property of the Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled "S. M. Franklin, Plaintiff, vs. Silver Bell

Copper Company, defendant," and was brought in this court.
990 That after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750 of said \$51,500, in his hands retaining the other \$25,750 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of \$25,750 so left in his hands as security after deducting the money so paid to him said S. M. Franklin.

The said Albert Steinfeld thereafter continued to hold and at the time of commencement of this action still held said sum of \$25,750 as such security, the same being the property of the said Silver Bell Copper Company.

XXX.

That as hereinabove found, said Albert Steinfeld, as treasurer and trustee of the Silver Bell Copper Company, on May 20th,
991 1903, received from said Imperial Copper Company the sum of \$115,000 in cash; That on August 23rd, 1903 one of said four promissory notes was paid, and said Steinfeld, as treasurer and trustee, as aforesaid, received in payment of the same the sum of \$101,500.00; That on November 23rd, 1903, another of said notes was paid and said Steinfeld, as such treasurer and trustee, received in payment of the same, the sum of \$102,987.50, making a total of \$319,187.50 that said Steinfeld as such treasurer and trustee had received by November 23, 1903, from said Imperial Copper Company on account of such purchase price.

That said money was disbursed by said Steinfeld as shown by his account presented and filed on December 26th, 1903, as hereinafter found.

XXXI.

That after the controversy arose in the city and county of San Francisco by and between the said plaintiff and the said Albert Steinfeld, resulting in the bringing of the action above referred to, on the 26th day of December, 1903, a meeting of the stockholders of said Silver Bell Copper Company was held at the city of Tucson,
992 son, County of Pima, Territory of Arizona, at which were present Albert Steinfeld, R. K. Shelton, J. N. Curtis and L. Zeckendorf, Eugene S. Ives, attorney for and representing Albert Steinfeld, and William H. Barnes, representing and attorney for L. Zeckendorf.

XXXII.

That at said meeting of December 26th, 1903, the following proceedings and discussions took place, to-wit:

"Meeting of the Stockholders of the Silver Bell Copper Company,
Held at the Office of Smith & Ives, Tucson, Arizona, December
26th, 1903, 4:00 p. m.

By Mr. IVES: If you will pardon me for making an opening statement—

We are here to see what we can do. You made us a proposition which was the same as the proposition which was submitted by Mr. Lilleanthal in San Francisco.

Now, we are unwilling, at this stage of the game, to do anything.

When I say "we," I mean Mr. Steinfeld, but we want to do
993 things if we can agree. As I gathered, one of the chief contentions of Mr. Zeckendorf's was that Mr. Steinfeld had the personal custody of the proceeds of these notes, and of the notes, and he objected to it.

Now, since then, he has brought two suits, one attachment or open suit for money in which an attachment has been issued, and the other, a stockholders' suit in which he has obtained an injunction.

Now, we want those suits disposed of. I am talking frankly in that matter—and until disposed of, Mr. Steinfeld is unwilling to agree to anything. He feels his business integrity has been impugned; and he wants them disposed of. Now, we want to meet you as far as we can. We will never be willing to admit that Mr. Steinfeld had the possession of these moneys wrongfully. We maintain now, as we maintained then, that he had them by virtue of the agreement which was executed in pursuance of a resolution of the Board of Directors, which he claims, and we believe was, a valid

resolution, and a valid agreement. (I am not arguing that
994 point with you.) He claims that. Now, you have attacked that agreement and the resolution. The prayer of your complaint asks that a receiver be appointed to hold the moneys and the notes in the Bank of California for the benefit of the Silver Bell Copper Company; that an injunction issue restraining Steinfeld from receiving, and the Bank of California from delivering to him said money and notes; that Steinfeld be required to set forth—

(3) That Steinfeld be required to set forth the nature of his claim to said money and notes and the terms of the agreement; and to account to the Silver Bell Copper Company for moneys received.

(4) That the resolution and agreement therein referred to be declared null and void.

(5) That the plaintiff have such other and further relief as may be just in the premises.

The first paragraph, that a receiver be appointed, I will pass.

The second subdivision is your prayer that an injunction issue;—that has been issued.

And third, that Mr. Steinfeld be required to set forth the
995 nature of his claim; he has done; he has given you a copy of the resolution which you already had; and he has given you a copy of the agreement which you did not have before, although we stated it as best we could verbally to Mr. Zeckendorf and Mr. Lilleanthal in San Francisco.

The fifth, asking for any other or further relief necessarily, I pass.

The fourth paragraph, that the resolution and the agreement herein referred to be declared null and void, we are willing to accede to.

I omitted to state that the third subdivision of your prayer asks, not only that he disclose the nature of his claim, but that he account for the moneys. That account he has rendered, and will be prepared to submit it at this meeting. He has resigned his office of treasurer of the Company, and he has turned over to Mr. Curtis all of the money which by such account appears to have been collected by him and not expended, except \$51,500.00 which has been garnished in his hands in the Franklin suit, and he has given to the Company a bond with two good sureties in that sum of money, that he will turn over that money to the Silver Bell
996 Copper Company whenever the suit is dismissed, or will turn over the balance, if any judgment should be collected, after paying what amount of money has been adjudged by judgment or otherwise to be due Mr. Franklin.

So we have set forth the nature of our claim. We have made the account; we have turned over the money. We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and agreement, and relinquish all right whatever to the personal custody of that money, and turn it over to the company.

Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the Board) should offer. But first I suggest an organization."

Mr. Shelton reads proposed resolution: "Resolved that the agreement executed on May 20th by the President and Secretary
997 of the corporation, the Mammoth Copper Company and Albert Steinfeld, be and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void."

Judge BARNES: We cannot settle the prayer of the complaint here.

Mr. IVES: We are acquiescing in your demand, that is what I mean.

Judge BARNES: Have you got a copy of that contract to attach to that resolution?

Mr. IVES: Yes, I am perfectly willing to do that.

Judge BARNES: And let that go on the minutes?

Mr. IVES: Certainly.

Mr. IVES: I intended this to be a Stockholders' meeting. We will now organize as a Stockholders' meeting.

Our desire is in good faith to rescind that resolution, but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.

998

Stockholders' Meeting.

Present:

J. N. Curtis, President.

R. K. Shelton, Secretary.

Stock Represented:

Mr. L. Zeckendorf.....	250 shares
Mr. Steinfeld	249 shares
Mr. Albert Steinfeld, Trustee.....	330 shares
Mr. R. K. Shelton.....	1 share
Mr. J. N. Curtis.....	170 shares
Total	1000 shares

Judge BARNES: There is a question about that.

Mr. IVES: That is the way it appears on the books of the Company; that does not consider any question whatever as to the ownership of the stock; that is the way it appears on the books of the Company for voting purposes, only.

Judge BARNES: As I read the minutes—I have a copy of the minutes—that heretofore in the meetings of the stockholders, 529 shares of stock of this company have stood in the name of L. Zeckendorf & Company, and they have been voted as such at all stockholders' meetings until this. That is an asset of L. Zeckendorf & Co.; never been divided; an asset of the company; would be liable to its debts; the creditors could pursue it; it belongs to L. Zeckendorf & Co.; it does not belong to Mr. Zeckendorf or Mr. Steinfeld, except as they agree to separate it.

Mr. IVES: Has it ever been separated on the books of the company?

Mr. STEINFELD: Yes, sir.

Mr. IVES: As far as the stockholders' meeting is concerned, the books of the company control. There is no waiver with respect to any ownership of stock.

Judge BARNES: We have no objection to passing that resolution on behalf of Mr. Zeckendorf.

I don't care to discuss the questions you have gone over. I don't know as anything is to be gained by it. If the contract of May 20th is rescinded that is all we care for on that point.

Mr. CURTIS: We have not voted on this resolution.

1000 Mr. IVES: Call the roll.

(Mr. Curtis called the roll and the following named stockholders voted "Yes" in favor of said resolution, the names of shares opposite their respective names):

Mr. L. Zeckendorf.....	250 shares.	Yes.
Mr. Albert Steinfeld.....	249 shares.	Yes.
Mr. Albert Steinfeld, Trustee.....	330 shares.	Yes.
Mr. R. K. Shelton.....	1 share.	Yes.
Mr. J. N. Curtis.....	170 shares.	Yes.

Mr. IVES: I will change this resolution: "Agreement executed on May 20th, by the President and Secretary of the corporation, with the Mammoth Copper Company *with* Albert Steinfeld, a copy of which is hereto annexed.

Judge BARNES: Yes, I will see if it is the contract, I think it is.

Mr. IVES: It is a copy of the contract I served you with.

Mr. IVES: I will add that Mr. Steinfeld, in addition to giving Mr. Curtis the money, has given Mr. Curtis an order upon the
1001 Bank of California; I mean Mr. Curtis as officer of the corporation, of the Silver Bell Copper Company,—an order upon the Bank of California for the money they have, and the notes, so that Mr. Steinfeld no longer makes any claim whatever for the personal custody of either the money or the notes.

Judge BARNES: As a stockholder of this company, Mr. Zeckendorf protests against the funds of this company being deposited in any other than in the name of the company, by its treasurer, and he insists as a stockholder, that the treasurer be required to give a bond for the faithful performance of his duties. And he protests against the funds of the company being kept in the name of anybody either as treasurer personally, or in any other manner except in the name of the company, and to be drawn out by the treasurer on direction of the company. If Mr. Steinfeld resigns we will choose another treasurer.

Mr. IVES: The directors will have to choose the treasurer.

Judge BARNES: Mr. Zeckendorf does not object to Mr. Steinfeld being the treasurer of this corporation.

1002 Mr. IVES: I will make a motion in the name of Mr. Steinfeld:

Mr. Steinfeld moves that the funds of the company shall be deposited in the name of the company by its treasurer, and shall not be kept in the name of anyone as trustee or personally or in any manner except in the name of the company, by its treasurer, and shall be drawn out only by the treasurer at the direction of the company.

We have left out what you said about the bond, for the present anyhow.

Mr. Steinfeld makes that motion. Is that seconded by Mr. Zeckendorf?

Mr. ZECKENDORF: Yes.

The aforesaid resolution put to vote and all the stock voted in favor of the resolution and the same was declared passed.

Judge BARNES: Now with reference as to who shall be treasurer. That is a question for the Board of Directors, and I would suggest on behalf of Mr. Zeckendorf, when they do choose a treasurer that

1003 Mr. Zeckendorf has no objection to Mr. Steinfeld being treasurer; but that whoever shall be treasurer they shall give a reasonable bond in proportion to the amount of money in his hands.

Mr. IVES: That is a very large amount of money.

Mr. ZECKENDORF: I think it should be for the amount involved.

Judge BARNES: Yes, for the amount in his hands.

Mr. IVES: That is a most unusual proceeding. We will consider it later.

Judge BARNES: Have you any further business you desire to bring before the meeting?

Mr. IVES: I don't know of any.

Judge BARNES: Now we want to say here at this meeting, Mr. Shelton appears as a Director of the Company. He is an employee of L. Zeckendorf & Co., is not the owner of any stock, and therefore he has no right to hold the office of director; he evades it by having one share of stock transferred to him; he don't own it; it is a mere evasion of that statute which says that a director must be a stockholder. It means a bona fide stockholder. We have no ob-

1004 jection to Mr. Shelton personally, he is an employee down there; he is down there to serve L. Zeckendorf & Co., and we don't want to embarrass him by having him get into difficulties of this corporation; and we think that this directors' meeting ought to take some action in that particular, if they desire to do it. Mr. Zeckendorf is a minority stockholder, but he is a large stockholder, besides the assets belong to L. Zeckendorf & Co. He is one of the three men that own this property. This property is all owned by Mr. Steinfeld, Mr. Curtis and Mr. Zeckendorf. Mr. Zeckendorf is the only one not allowed to be a director; and we think that they ought to be directors who are bona fide stockholders.

Mr. IVES: We will consider that. For myself, personally, I see nothing unreasonable in that, but until these suits are disposed of we feel we have gone as far as we care to.

Judge BARNES: There is another matter we desire to bring before you. This company has practically sold its assets, and got nothing left but the proceeds of that sale; it has got cash and notes coming in. There are some obligations. There is an obligation on

1005 Mr. Steinfeld's part to guarantee these titles up to the 20th of May, when the last payments are due. Now, these guarantees

are matters that Mr. Zeckendorf regards as of small moment; he would be willing to assume the obligations of all of them for fifteen or twenty thousand dollars. We do not think that with \$200,000 of money coming in between now and next April, many times more than enough to meet any obligation that can come up, including the suit of Mr. Franklin, or any other threatened suits, or to make good the guarantee of good title up to the 20th of May. That it is an injustice to the stockholders of this company to hold the funds back as against Mr. Franklin's suit; that suit cannot possibly be tried until long after the 20th of April. We think it an injustice to these stockholders to tie up these funds when there is over \$200,000 coming in, more than ample to pay them. More than that, Mr. Zeckendorf is amply good to protect Mr. Steinfeld to the extent of his interest in this company. We feel that the moneys on hand ought to be divided up: First to the paying of Mrs. Francis, whatever it is;

1006 \$12,000 to the paying of Mrs. Nielsen; and that the balance of the money ought to be paid to the stockholders; they ought to have the use of the money, and leave it to the last payment to the protection of these obligation. They are not dangerous, to the extent of more than \$50,000 at the outside, and there will be

\$100,000 and six per cent interest due on the 20th of May. Mr. Franklin's suit cannot be tried until long after that.

So that, we think that the moneys on hand, the proceeds of the sale of this property, after deducting sufficient to pay Mrs. Nielsen and Mrs. Francis, that the balance of this money should be distributed, and that there ought to be a dividend made of these funds.

And I will make a still further suggestion. It has been stated here that they are very anxious to have this injunction dismissed. If this be done, and the money be reserved or paid to Mrs. Nielsen and Mrs. Francis and a dividend be made of the money on hands, leaving to the last payment the protection of Mr. Steinfeld's obligations, and also by leaving these notes in the hands of the Bank of California with directions to collect this money and deposit it to the credit of the company. With that done, I am satisfied 1007 that Mr. Zeckendorf would be very willing to dismiss the injunction suit.

Mr. IVES: While in all human probability these notes will be paid, they have not been paid yet. If the Imperial Copper Company should turn out to be unable or unwilling to pay them the mine will come back.

Judge BARNES: And they are good for all these obligations.

Mr. IVES: The mines would come back. Now, whether it would be good policy for this company to distribute all of its funds without any money to work the mines, I concur that that is a question of judgment.

Judge BARNES: These three gentlemen are well able to do that and they can raise money.

Mr. IVES: It won't be long after the notes are paid. I won't say that there won't be any distribution, but I think that these suits should be dismissed without any condition whatever. We have complied with the prayer of your complaint.

Judge BARNES: I won't say whether they will or not. I am simply discussing it as a business policy; that these funds 1008 ought to be distributed. The company is not engaged in any business; its mines are sold; if they should come back they would come back free from any obligations. There is no reason why my client, Mr. Zeckendorf, should not have the use of his money, no reason in the world; I think Mr. Curtis has about \$17,000 of his money in it; I don't see why he, Louis Zeckendorf, should not have his.

Mr. IVES: That is a question; it is a matter of policy; and there is a great deal to say in support of the view you take of it. That will be considered. Until the suits are disposed of—

Judge BARNES: Those things will have to be somewhat simultaneously, you cannot expect those things to be done unless they are done as current acts.

Mr. IVES: This is practically a demand by Mr. Zeckendorf who chances to be plaintiff in a suit which it appears to me to be totally without merit—

Judge BARNES: I have not said that; I said we would consider this matter; I have not said what we would do; I simply suggested that it would be wise to consult together—

1009 Mr. IVES: We feel that we should be met now and the injunction suit dismissed and the attachment suit.

Judge BARNES: We will consider that.

Mr. IVES: I will now show you this statement.

(Statement omitted in this copy.)

Mr. IVES: We are not asking you to audit it; we only want you to see what has been done.

Judge BARNES: Now this item of \$51,500 garnishee of Mr. Franklin; I don't think that money should be held back from these stockholders that is a contested lawsuit, and it will probably not be settled for two or three years.

Mr. IVES: Mr. Curtis, has Mr. Steinfeld turned over to you as officer of this company the sum of sixty thousand dollars in money?

Mr. CURTIS: Yes, sir.

Q. You have that money?

A. Yes, sir.

Q. And will now deposit it to the credit of the Silver Bell Copper Company in pursuance of this resolution?

A. Yes, sir.

Q. You have an order upon the Bank of California for the \$49,987.50?

1010 A. Yes, sir.

Q. You have it as officer of this company?

A. Yes, sir.

Q. Signed by Steinfeld, instructing the bank to deliver it to you?

A. Yes, sir; as officer of this company.

Q. And when you get it as officer of this company, you propose to deposit it to the credit of the company in pursuance to the resolution passed here today?

A. Yes, sir.

By Judge BARNES: Where deposit it?

Mr. IVES: Where do you suggest?

Judge BARNES: The banks here in Tucson are good banks; I don't see why you should go to California.

Mr. IVES: Is that satisfactory to you? Judge Barnes suggests that the money be deposited in the banks here at Tucson.

Mr. ZECKENDORF: I have no objection.

Mr. IVES: Is that satisfactory to you, Mr. Shelton?

Mr. SHELTON: Yes, sir.

Mr. IVES: Then Mr. Curtis you will deposit it here in Tucson.

Mr. IVES: Mr. Curtis, a bond has been given by Mr. Steinfeld for this \$51,500 garnishee of Mr. Franklin's. You have that bond as officer of the company?

A. Yes, sir.

Mr. IVES: Now, Judge, we have gone quite a little distance.

Judge BARNES: Yes, and we will think it over. I think I have stated to you about what Mr. Zeckendorf's feeling is. I don't think we should allow sentiment to trouble us. Mr. Zeckendorf is not pugnacious by any means, but he feels that he is entitled to his dividends and he ought to have his money and he feels that he can make good and that Mr. Steinfeld and Mr. Curtis can make good whenever the time comes.

Mr. IVES: Is there anything else?

Judge BARNES: We have nothing to offer.

Judge BARNES: Wait a minute; I understood that these three hundred shares acquired from Mrs. Nielsen on which there is payable some \$10,000 is the property of the company——

Mr. IVES: That is a matter we won't discuss; we won't discuss anything whatever until those suits are dismissed.

1012 Judge BARNES: Mr. Zeckendorf claims, and will claim, if the difficulty goes on that those 300 shares belong to L. Zeckendorf and Company, but he is willing to state that they belong to the corporation; he is willing that Mr. Curtis shall have the benefit of that proportion, but we want to know which it is.

Mr. IVES: That is a matter the stockholders have nothing to do with.

Meeting adjourned.

R. K. SHELTON, *Secretary*.

That attached to said resolution, above set out, was a copy of the agreement of May 20th, 1903, set out in full in Finding XXV above.

That thereafter at said meeting, the said Albert Steinfeld, as the Treasurer of said Silver Bell Copper Company, submitted to the said stockholders a statement of his account as such treasurer and of the money of said company in his hands as such, showing the receipts and expenditures by him as treasurer of said corporation, of

1013 the moneys of said corporation, said statement being as follows, to-wit:

Silver Bell Copper Company.

1903.

May 20	By Imperial Cop. Co., 1st pay.....	\$415,000.00	
	To telegr./, transfr. L. Z. Co., N.Y....	75,000	
	Less ret.	617	
		874,383.00	
	Commission paid N. O. Murphy.....	22,500.00	
	Albert Steinfeld, Cont.....	48,417.00	
		115,000.00	115,000.00
Aug. 23	By Imperial Cop. Co., 1st note.....		\$401,500.00
	To L. Zeckendorf & Co., dep.....	35,000.00	
Sept. 4	" " " ".....	5,000.00	
Oct. 20	To F. J. Heney, Contract.....	1,500.00	
	Garnished S. M. Franklin suit.....	51,500.00	
	Balance on hand.....	8,500.00	
		101,500.00	101,500.00
1014			
Nov. 23	By Imperial Cop. Co., 2nd note.....		102,987.50
	To Smith & Ives, Ret.....	500.00	
25	" " " ".....	1,000.00	
Dec. 26	Attachment Bank Cal.....	49,987.50	
	Balance on hand.....	51,500.00	
		102,987.50	102,987.50
	Balance on hand 1st note.....		8,500.00
	Balance on hand 2nd note.....		51,500.00
	Attached Bank of Cal.....		49,987.50
			109,987.50

That in the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either

Albert Steinfeld or the Mammoth Copper Company any
 1015 right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.

XXXIII.

That thereafter on said 26th day of December, 1903, a special meeting of the Board of Directors of said Silver Bell Copper Company was held at which were present J. N. Curtis, R. K. Shelton, Albert Steinfeld and Eugene S. Ives, Attorney for Albert Steinfeld.

That thereupon and at said meeting, Albert Steinfeld resigned as treasurer of said Silver Bell Copper Company, and J. N. Curtis was elected treasurer of said company, and thereupon on motion of R. K. Shelton, acting at the request of said Eugene S. Ives, attorney for said Steinfeld, the following resolution was adopted, viz.:

"Whereas, At the twelfth meeting of the Board of Directors of this company held at the office of the company in the city of
 1016 Tucson on the 20th day of May, 1903, the proceedings whereof appear upon pages 43, 44, 45, 46, 47 and 48 of the minute book of this corporation, certain resolutions were passed, which said resolutions are set out in full upon said minutes; and,

"Whereas, Simultaneously with the passage of the resolutions, a certain agreement of date May 20th, 1903, was executed and delivered, which said agreement was in the words and figures following, to-wit:

"This Agreement, Made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part and Albert Steinfeld of Tucson, party of the third part, Witnesseth:

Whereas, The parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Com-
 1017 pany, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank of Phoenix, Arizona; and,

Whereas, The parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and,

Whereas, The said Albert Steinfeld has assumed certain obligations with said Imperial Copper Company as more fully appears in the various agreements heretofore entered into by him in making such

sale, and particularly in a certain Guarantee Agreement, wherein amongst other things said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and parties of the first and 2nd part desire to indemnify him against loss by reason of any of said matters or things so done by him;

Now therefore, in consideration of the premises and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is 1018 heretv mutually agreed, that the purchase price paid and to be paid upon the said sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for and as indemnity against loss, damage, or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed, that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on ac- 1019 count of any such obligations or liabilities so assumed by him.

In witness whereof, The said corporation, parties of the first and second part, *has* caused these presents to be signed by *its* president- and secretary- and *its* corporate seal- to be hereunto affixed by resolution of *its* Board- of Directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate." And,

Whereas, In pursuance of said agreement four certain promissory notes made by the Imperial Copper Company to the order of the Silver Bell Copper Company were endorsed and turned over to Albert Steinfeld; and,

Whereas, Said Steinfeld duly received the proceeds of the first of said notes and paid out for the benefit of this company a certain proportion thereof; and,

Whereas, The said Steinfeld deposited the three remaining notes with the Bank of California, at San Francisco for collection; and,

Whereas, The said Bank of California presented for col- 1020 lection the first maturing of the said notes, and received the proceeds thereof and turned over to said Steinfeld all of the said proceeds except the sum of \$49,987.50; and,

Whereas, The said bank still has the last mentioned sum and the two remaining notes; and,

Whereas, Louis Zeckendorf, who appears upon the books of this company to own 250 shares of the capital stock of this company in violation of the rights of the said Steinfeld under the said agreement and resolutions notified the Bank of California not to pay the

said sum of money or to deliver the said notes or the proceeds thereof to the said Steinfeld; and,

Whereas, The said Zeckendorf did thereafter bring suit in the Superior Court of the County of San Francisco and State of California, against this company, the Bank of California, Albert Steinfeld, J. N. Curtis and R. K. Shelton, the directors of this company, wherein he filed his verified complaint, in which said complaint he alleged, referring to the said resolution, as follows:

1021 That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at all, in that said Steinfeld joined in the vote therefor, and in that the other two directors are in the employ of the said Steinfeld and wholly under his control; and in that said Shelton does not own any shares of stock of said corporation, and in that they were pretended to be adopted at the instigation of said Steinfeld and as part of a claim on his part to defraud said company and its shareholders * * * and said two other directors and defendants Curtis and Shelton then and always were and still are acting solely in the interest of and are under the complete control and dominion of said Steinfeld and blindly, and without consideration of the interest of said corporation, carry out all of his directions.

That it would be a futile and vain proceeding for this plaintiff (Zeckendorf) to demand of said Board of Directors to take proceedings on behalf of said Silver Bell Copper Company against said

Steinfeld to recover the moneys and notes so unlawfully
1022 held by him, and which he claims to have the right to hold as against said corporation, or to rescind said last mentioned agreement or resolution, because said directors and defendants Curtis and Shelton are acting solely in the interest of and are under the sole control of said Steinfeld and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised; And in which said complaint the said Zeckendorf demanded judgment as follows:

(1) That a receiver be appointed to hold said moneys and said notes in said Bank of California for the benefit of said Silver Bell Copper Company, during the pendency of this suit;

(2) That an injunction issue restraining said Steinfeld from receiving, and said Bank of California from delivering to him said moneys or said notes now in the custody of said Bank of California;

(3) That said Steinfeld be required to set forth the nature
1023 of his claim to said moneys and said notes, and the terms of the agreements referred to in said resolutions, and to account to said Silver Bell Copper Company for moneys received or that may hereafter be received by him belonging to said corporation;

(4) That said resolutions and the agreements therein referred to, be declared null and void."

And,

Whereas, The said resolutions were passed by the Board of Directors of this company, and the said agreement was executed by its officers in good faith and with the sole intent and purpose to

advance and protect the interest of this company and of all persons concerned, nevertheless in view of the said actions of the said Zeckendorf, the owner of a large portion of the stock of this corporation, and of the charges and allegations which he has made, and of the hostile attitude which he has assumed toward the entire transaction, and in compliance with his wish, prayer and demand, and in order to avoid litigation; and all of the owners of the stock of said corporation except the said Zeckendorf having been consulted by the directors, and having acquiesced in the foregoing recitations and in this action about to be taken by this board, and the said
 1024 Albert Steinfeld and the Mammoth Copper Company having indicated their willingness and consent thereto, and having offered to sign any paper or papers, and to do upon demand all things and acts necessary to accomplish and consummate a full re-cission of the said agreement; and the said Steinfeld having given to this company an order upon the Bank of California for the said money and notes and having tendered to this company all of said funds still in his hands, together with a full and complete account of all moneys received and disbursed by him.

Be it resolved:

(1) That the said resolutions passed by the Directors on the said 20th day of May, 1903, be, and the same are, rescinded and repealed.

(2) That the said agreement heretofore recited in full be rescinded and declared null and void.

(3) That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company which have not yet matured, and to give his proper receipt therefor.

1025 (4) That the officers of this company be instructed to execute with and deliver to said Steinfeld and Mammoth Copper Company, an agreement rescinding the said agreement ab initio and to do and cause to be done all such acts and things as may be necessary to accomplish and consummate the full re-cission of the said agreement; and that J. N. Curtis, the president and treasurer of the company, be instructed to receive from said Steinfeld the funds tendered by him as hereinbefore recited, and be further instructed to demand and receive from the Bank of California the said money and notes now held by the said bank."

The foregoing resolution was adopted, Mr. Curtis and Mr. Shelton voting in the affirmative, and Mr. Steinfeld being present not voting.

Mr. Steinfeld thereupon made the following statement:

"I concur in the above resolution and consent to the re-cission of the said contract. I have not voted thereon by reason of the fact that it might be stated that I was an interested party."

Mr. Shelton offered the following resolution:

1026 "Resolved, That on account of Mr. Albert Steinfeld of funds of the Silver Bell Copper Company, held by him under a certain agreement executed on May 20th, 1903, which has been this day rescinded, which said account is as follows:

Silver Bell Copper Company in Account with Albert Steinfeld.

1903.			
May 20	By Imperial Cop. Co. 1st payment.....	\$115,000.00	
May 21	To teleg. trans. L. Zeckendorf & Co., \$75,000.00		
	Less ret.	617.00	
		<u>\$74,387.00</u>	
	To commission paid N. O. Murphy.....	22,500.00	
	To A. Steinfeld cont.....	18,117.00	
		<u>115,000.00</u>	<u>115,000.00</u>
Aug. 23	By Imperial Cop. Co. 1st note.....		101,500.00
Aug. 23	To L. Zeckendorf & Co., dep.....	35,000.00	
Sep. 4	To L. Zeckendorf & Co., dep.....	5,000.00	
Oct. 20	To F. J. Heney, contract.....	1,500.00	
	To garnishee S. M. Franklin suit.....	51,500.00	
	To balance on hand.....	8,500.00	
		<u>101,500.00</u>	<u>101,500.00</u>
Nov. 23	By Imperial Cop. Co. 2nd note.....		102,987.50
Nov. 25	To Smith & Ives, ret.....	1,500.00	
	To attachment Bank Calif.....	49,987.50	
	Balance on hand.....	51,500.00	
		<u>102,987.50</u>	<u>102,987.50</u>
	Balance on hand 1st note.....		8,500.00
	Balance on hand 2nd note.....		51,500.00
	Attached Bank of California.....		49,987.50
			<u>109,987.50</u>

1027 Be, and is hereby audited and approved.

That this plaintiff had no knowledge whatsoever of the holding of said Directors' meeting on the 26th day of December, 1903, until after the 21st day of January, 1904, and had no knowledge until said last mentioned date that any such meeting was planned or contemplated.

That after said directors' meeting and on the said 26th day of December, 1903, and in pursuance of said resolutions of said Directors' meeting an agreement was executed and delivered, which is defendants' Exhibit S; and in pursuance of said resolution and agreement, on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day said Steinfeld paid to Curtis, treasurer of the Silver Bell Copper Company, the sum of \$18,117.00.

XXXIV.

That on the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N.

1028 Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to said company except the sum of \$51,500.00 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said

Steinfeld delivered to the said treasurer of the said corporation an order upon the Bank of California, authorizing and requiring the said bank to deliver to the said corporation or its duly authorized officer the said money and notes so deposited by him as aforesaid, and the same were, after December 26th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld.

That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700.00.

1029

XXXV.

That on the 16th day of January, 1904, defendants Steinfeld, Curtis and Shelton met as Board of Directors of said Silver Bell Copper Company, no one else being present except Eugene S. Ives, the attorney for said Steinfeld, and no one else having any notice or knowledge of such meeting, and as such board at the request of said Ives and Steinfeld, purported to adopt and pass a resolution and cause the same to be spread upon the minute book of said corporation, reading as follows:

"Whereas, the properties of this company together with certain mining properties belonging to and owned by the Mammoth Copper Company and Albert Steinfeld, respectively, were on or about the 20th day of May, 1903, sold to the Imperial Copper Company for the gross sum of \$515,000, payable \$115,000 in cash and the balance in four promissory notes, each for the sum of \$100,000 with interest at the rate of 6 per cent. per annum, payable respectively three, six, nine and twelve months after date; and,

1030 "Whereas, deeds properly executed by this company for the properties owned by it, and properly executed by the Mammoth Copper Company for properties owned by it and properly executed by Albert Steinfeld for properties owned by him, have been deposited in escrow with the Phenix National Bank, to be delivered to the guarantee, in all of such deeds, to-wit, the said Imperial Copper Company, upon the payment of the said notes and all of them, according to the tenor thereof; and,

"Whereas, simultaneously with the said sale an agreement was made between this company and the said Mammoth Copper Company, and the said Albert Steinfeld, which provided for the disposition of all of the said purchase price; and,

"Whereas, the said agreement was by consent of all parties thereto and of all parties interested therein, rescinded on or about the 26th day of December, 1903; and,

"Whereas, the said Albert Steinfeld did on or about the 26th day of December, 1903, return to this company, by paying the
1031 same to the treasurer thereof, the sum of \$319,487.50 upon said purchase price and consideration for the said agreement rescinded as aforesaid; and,

"Whereas, previous to the said rescission of said agreement the treasurer of this company had received the sum of \$319,487.50

upon the said purchase, and has at this time in his hands two of the said notes, to-wit, the notes becoming due on the 20th day of February, 1904, and the 20th day of May, 1904; and,

"Whereas, Albert Steinfeld and the Mammoth Copper Company jointly do claim that the properties owned by them and sold to the Imperial Copper Company as aforesaid, were and are of far greater value than the property owned by this company and sold to the Imperial Copper Company as aforesaid; and,

"Whereas, the said Steinfeld and the Mammoth Copper Company acting jointly as aforesaid have asserted their ownership of and right of possession to more than one-half of the said purchase price, and

1032 have offered to accept one-half of the cash received, and one of the said promissory notes in full of all of their claim to any part or portion of the said purchase price; and it appearing by the books of this company that of the said sum of \$319,387.50 the sum of \$25,000 has been paid to N. O. Murphy and A. S. Donau for commissions effecting the said sale, and that the sum of \$3,000 has been paid to attorneys-at-law for services rendered to this company, and the said \$28,000 being properly a charge upon the whole of said purchase price; and,

"Whereas, Selim M. Franklin has brought suit against this company for the sum of \$51,500, and an attachment has been issued in said suit, and the said sum of \$51,500 has been garnisheed in the hands of Albert Steinfeld, who at the time of said garnishment was holding that portion of the said purchase price in pursuance of the agreement rescinded as aforesaid and up to this date has been held by him; and,

"Whereas, the said Albert Steinfeld has given this company his bond therefor and has now returned to the treasurer of this company \$25,750 thereof, the receipt whereof is hereby acknowledged;

1033 "Now, therefore, be it resolved that upon the receipt from the said Mammoth Copper Company and Albert Steinfeld of a release jointly and severally of all right and interest in the said purchase price whatsoever, except such as Albert Steinfeld may have as a stockholder of this company, the treasurer of this company be and is hereby authorized and directed to pay to the said Albert Steinfeld the sum of \$145,743.75 in cash, the same being one-half of the said sum of \$319,487.50, the total cash received, less the said sum of \$28,000; and that the treasurer of this company be and is hereby authorized and directed to endorse and deliver to the said Albert Steinfeld one of the said promissory notes."

That said Curtis and Shelton in voting for the adoption of said resolution, and said Curtis in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no person whomsoever, except said Steinfeld and his attorney, Eugene S. Ives, and in so voting and acting, said Curtis and Shelton were under the complete dominion and control of said Steinfeld, and voted and acted on his orders and not otherwise

1034

XXXVI.

That thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company and as such having in his possession the cash and under his control the notes of said company above mentioned, and under no other authority or claimed authority than as heretofore set out, paid to the said Albert Steinfeld of the funds held by him as treasurer of the said Silver Bell Copper Company then in his, Curtis', hands as such treasurer, the sum of \$145,743.75 in cash (the same being one-half of the sum of \$319,487.50, less the sum of \$28,000) and thereupon delivered to said Albert Steinfeld one of said two promissory notes, and which said funds and notes said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company, and thereupon said Steinfeld appropriated said moneys so received and said note to his own individual use and not to the use or benefit of any other person or corporation whatsoever.

1035 That the said note so delivered to said Albert Steinfeld at the time of said delivery was worth the full amount of the principal and interest thereof, viz: \$100,000.00 with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent per annum, and said Steinfeld collected said full sum thereon and retained the same to his own use.

That said Steinfeld also retained the sum of \$25,750, the funds of said corporation garnished by S. M. Franklin and which still remained in his hands as treasurer aforesaid, and which with said sum of \$145,743.75 in cash, so paid to him by said J. N. Curtis as the treasurer of said company, made a total sum of \$171,493.75 in cash.

That said Albert Steinfeld collected on said note so delivered to him prior to the commencement of this action the sum of \$103,967.00, which with said sum of \$145,743.75, made a total sum of \$249,710.75, which said Albert Steinfeld so received from said defendant corporation, and all of which said sum before the commencement of this action said Albert Steinfeld took as his own property, to his own use, and said Albert Steinfeld thereafter

1036 kept the same as his own property and not as the property of any other person, firm or corporation, and not for the use or benefit of any other person, firm or corporation, and that no part of said sum has been paid back to said Silver Bell Copper Company.

XXXVII.

That subsequent to the 10th day of January, 1904, and prior to the 16th day of January, 1904, said Silver Bell Copper Company collected on the other of said two promissory notes the sum of \$103,967, and which said sum was paid into the treasury of said Silver Bell Copper Company.

XXXVIII.

That on the 20th day of January, 1904, the directors of the said Silver Bell Copper Company passed a resolution, declaring a divi-

dend of \$111.00 per share on the capital stock of said Silver Bell Copper Company. Said Albert Steinfeld thereupon collected and received from the treasurer of said corporation the sum of \$111.00 per share as such dividend on the 300 shares of stock belonging to said Silver Bell Copper Company, standing in his name as trustee, as aforesaid, receiving as such dividend on said stock the sum of \$33,300.00 and which said sum the said Albert Steinfeld thereupon converted to his own use and benefit and not to the use or benefit of any other person or corporation whatever, and the same has not, nor has any part thereof, been paid to or for the Silver Bell Copper Company, but the whole thereof with interest from the 26th day of January, 1904, at the rate of 6 per cent per annum remains unpaid. That the said dividend of \$111.00 per share on said 300 shares was paid to the said Albert Steinfeld because of and on account of his control of said corporation. That said money received by said Albert Steinfeld as such dividend on said 300 shares of stock was the money and property of said Silver Bell Copper Company, and said Albert Steinfeld had no right thereto, and had no right to receive the same and convert the same to his own use. That said dividend (except as to said 300 shares of stock standing in the name of Albert Steinfeld as trustee) was regularly declared; that R. K. Shelton was paid and received the sum of \$111.00 on such dividend, being the

dividend on the one share of stock standing in his name; That said J. N. Curtis was paid and received the sum of \$18,870.00, being the dividend on 170 shares standing in his name; That said Albert Steinfeld in addition to said \$33,300.00 was paid and received the sum of \$27,639.00, being the dividend on the 249 shares standing in his name and belonging to him. That plaintiff has now been paid and has received the sum of \$27,750.00, being the dividend on 250 shares; the same being accepted by plaintiff without prejudice to this action and under agreement that the same should in no manner affect this action.

XXXIX.

That this action is prosecuted by the plaintiff above named, as stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; That this plaintiff, in that regard, has employed as attorneys for the bringing of this action for the benefit of the Silver Bell Copper Company, Edwin A. Meserve of Los Angeles, California, and Frank H. Herford of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result

of the bringing and prosecuting of this action: That ten per cent of the amount for which judgment is finally given in this action, is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company, as attorneys' fees for bringing and prosecuting this action for its benefit.

XL.

That as hereinabove found, the defendants, Shelton, Curtis and Steinfeld, are the directors of said Silver Bell Copper Company; that said Curtis and Shelton are under the absolute control and dominion of said Steinfeld, and that if any moneys or properties belonging to said corporation should be returned to said corporation, the same would be still in the hands of the same parties and controlled by them and would be again placed under the control of defendant Steinfeld; that it will be unequitable and wrong that said money should again be paid to said corporation and be again placed under the control, dominion and in the custody of said Albert Steinfeld, and it is therefore meet, equitable and proper that a receiver of all of the properties, books and papers of said corporation should be appointed by this court, in order to receive the money of said corporation and properly apply the same, and that the same further might be properly paid out, used and handled as this court in the exercise of its discretion may hereafter order, decree and determine.

XLI.

That the \$2,000.00 paid by Steinfeld at the time of the purchase of the said 300 shares of stock was the personal money of said Steinfeld and that said Zeckendorf knew that Steinfeld had paid the same out of his personal money, for and in behalf of the corporation.

XLII.

That Selim M. Franklin at all the times herein mentioned was an attorney at law in active practice in the City of Tucson, and that during all of the said times prior to the month of June, 1903, was the attorney for the said company and the said L. Zeckendorf & Company and the said Albert Steinfeld, and at no time was under the domination or influence of said Steinfeld so as to do anything in any of the transactions involved in this litigation to the advantage of said Steinfeld and against the interest of said company or the said Zeckendorf.

XLIII.

That at no time prior to about the 20th day of May, 1903, did the Nielsen Mining & Smelting Company or the Silver Bell Copper Company offer or agree to repay to Albert Steinfeld any of the several sums of money, or any part thereof, paid by him to Francis & Volkert, or to the English owners of the English group of mines, except as in these findings set forth.

XLIV.

And at no time prior to about the 20th day of May, 1903, did the said Nielsen Mining & Smelting Company or the Silver Bell Copper Company agree to assume any obligation which the said Steinfeld incurred in and by the execution of said agreement of date May 16th, 1900, with Francis and Volkert.

XLV.

That all of the money expended by said Steinfeld in the purchase of the Francis and Volkert titles and the English titles to the English group of mines, was the personal money of the said Steinfeld, and that at no time did the said Steinfeld offer to loan to the said company any sums of money whatever for the purchase of either of the titles to said group of mines.

Dated this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge*.

Filed October 2, 1908.

1043 *Defendants' Motion for Additional Findings.*

(Title of Cause.)

Come now the above named defendants, and move the court to make the following additional findings of fact:

I.

That Albert Steinfeld did not at any time prior to the 29th day of June, 1900, or upon such date, loan to the Nielsen Mining and Smelting Company or agree to loan said company the sum of \$2,000.00 or the sum of \$1,000.00 or any sum whatever wherewith the said company might purchase from Carl Nielsen and Mary Nielsen, his wife, or either of them the 300 shares of stock of the Nielsen Mining and Smelting Company which were owned by the said Carl Nielsen or Mary Nielsen, his wife.

II.

At no time prior to about the 20th day of May, 1903, did the Nielsen Mining and Smelting Company of the Silver Bell Copper Company agree to repay to the said Albert Steinfeld the said
1044 sum of \$2,000.00 paid by him on the said 29th day of June, 1900, as aforesaid, or any part thereof.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for Defendants.

Filed September 28, 1908.

Judgment.

(Title of Cause.)

This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof, presiding, sitting without a jury, (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises, 1015 wherefore by virtue of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed:

First, That the plaintiff recover nothing upon the first cause of action in the complaint set forth, and as to the said first cause of action the defendants go hence without day.

Second, That Albert Steinfeld upon the second cause of action in said complaint set forth, pay to the defendant the Silver Bell Copper Company, and that the said Silver Bell Copper Company do have and recover from said Albert Steinfeld, the sum of \$20,850.00 with interest thereon at the rate of six per cent per annum from the 20th day of January, 1904; that plaintiff do have execution for the said sum of \$20,850.00 and interest thereon from said date against the said Albert Steinfeld, the recoveries on said execution to be paid to the defendant the Silver Bell Copper Company or to the receiver of said company to be appointed as in this judgment provided.

Third, That L. Zeckendorf, plaintiff in the above entitled 1016 action, do have and recover of and from Albert Steinfeld his plaintiff's costs in this action herein taxed at the sum of \$362.60 and that plaintiff do have execution in his favor and against said defendant therefor.

Fourth, That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the said Silver Bell Copper Company the sum of \$2,652.50 as and for attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$2,652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld.

It is further ordered, adjudged and decreed and the Court does hereby order that Hiram W. Fenner be, and he is, hereby ap- 1047 pointed receiver of all property, money, book and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or

assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver, the same to be held by the said receiver and retained and kept in possession, and to be distributed, paid out and disbursed upon the orders of this Court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute a bond in the sum of \$— in the usual form of receiver's bond, to be approved by this Court, for the faithful performance by him of his duties, as receiver; and the said Hiram W. Fenner as such receiver immediately upon the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in accordance with the orders and judgment herein contained, and in 1048 accordance with the orders to be made by this Court from time to time hereafter.

It is further, ordered, adjudged and decreed that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged, and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

The said dissolution, payments, disbursements and distributions to be done and accomplished by orders of this Court for that purpose in this action made and to be made.

It is further ordered, adjudged and decreed That Albert Steinfeld holds the sum of \$25,750 money of said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin vs.

Silver Bell Copper Company, said Steinfeld to account to said 1049 corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company.

Done in open court this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge*.

Filed October 4, 1908.

(Title of Cause.)

Plaintiff's Motion for New Trial.

Now come the plaintiff and moves for a new trial herein on the following grounds:

1. That the Court erred in admitting evidence.
2. That the Court erred in rejecting evidence.
- 1050 3. That the evidence does not sustain the judgment.
4. That the judgment is contrary to the evidence.

5. That the judgment is contrary to the law.
6. That the evidence is insufficient to sustain the findings of fact or any one of them.
7. That the Court has failed to find upon questions of fact.

EDWIN A. MESERVE,
FRANK H. HEREFORD,
Attorneys for Plaintiffs.

Filed August 3, 1908.

Defendants' Motion for New Trial.

(Title of Cause.)

Now come the defendants and move for a new trial on the second cause of action in the amended complaint set forth, on the ground:

1. That the Court erred in admitting evidence.
- 1051 2. That the Court erred in rejecting evidence.
3. That the evidence does not sustain the judgment.
4. That the judgment is contrary to the evidence.
5. That the judgment is contrary to the law.
6. That the evidence is insufficient to sustain the findings of fact or any one of them.
7. That the Court has failed to find upon questions of fact.

EUG S. IVES
Attorney for Defendants.

Filed Aug. 3, 1908.

(Title of Cause.)

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, that the time for filing the Memorandum of Costs and Disbursements in the above entitled action be, and the time is hereby extended, to and include the 14th day of August, 1908, and
1052 the Memorandum of Costs hereto filed on the 7th day of August, 1908, in said case is withdrawn.

EDWIN A. MESERVE,
FRANK H. HEREFORD,
Attorneys for the Plaintiff,
FRANCIS J. HENNEY,
EUGENE S. IVES,
Attorneys for the Defendants.

Filed Aug. 12, 1908.

Memorandum of Costs and Disbursements.

(Title of Cause.)

Disbursements.

Sheriff's fees	\$12.00	
Clerk's fees	83.30	
Witness fees, depositions Lillenthal and Zeckendorf	25.50	
Paid attorney for defendants judgment for costs assessed by Supreme Court in Remittitur.....	\$45.20	} Followed Oct. 24, 1908. ALLAN B. JAYNES, Clerk
Clerk Supreme Court costs.....	69.90	
Suppl. Abstract of Record.....	37.50	
Abstract of testimony in re justification of sureties on appeal bond.....	19.60	
Printing brief (more than 20 pages).....	20.00	
1053 Copy of evidence as per stipulation of parties	541.80	
	<hr/> \$1,654.80	

EDWIN A. MESERVE,
FRANK H. HEREFORD,
Attorneys for the Plaintiff.

Reduced to \$662.60 by order of Court Oct. 24, 1908.

ALLAN B. JAYNES, *Clerk.*

Filed August 13, 1908.

Exceptions to Cost Bill.

(Title of Cause.)

Come now the defendants in the above entitled action, and except and object to the following items contained in the statement and bill of costs heretofore filed and served by the plaintiff, upon the following grounds, to-wit:

I.

Defendants object and except to the item "paid attorney for defendants, judgment for costs assessed by Supreme Court in Remittitur, \$845.20," upon the following grounds:

a. That heretofore and during the year 1905, this cause was tried before the above named court, and a judgment rendered and entered therein in favor of the plaintiff and against the defendants; that thereupon the defendants duly appealed from said judgment to the Supreme Court of the Territory of Arizona, and thereafter said cause came on duly to be heard before said Supreme Court, and after due hearing said Supreme Court duly rendered its judgment reversing the judgment appealed from and di-

recting that said cause be remanded for a new trial; that thereafter, on motion of the above named plaintiff, the appellee in said Supreme Court, said Supreme Court granted a re-hearing of said cause, and thereafter said cause was again argued before said Supreme Court, and thereafter said Supreme Court rendered judgment adhering to its former decision and reversing the judgment appealed from and directing that said cause be remanded to this court for a new trial, and that these defendants, appellants in said Supreme Court, recover of this plaintiff, the appellee in said Supreme Court, their costs in said last named court; that thereafter the judgment of said Supreme Court was duly entered adjudging and decreeing that the judgment appealed from be in all
1055 things reversed and the cause remanded to the District Court for a new trial, and that the appellants in said court, to-wit, these defendants, recover of and from the appellant in said court, to-wit, this plaintiff, their costs in said Supreme Court, taxed at the sum of \$845.20; that thereafter said cause was duly remanded to this court for a new trial, and pursuant to said judgment of said Supreme Court the plaintiff paid to these defendants the sum of \$845.20, the costs adjudged in and by the judgment of said Supreme Court; that the judgment of said Supreme Court in favor of these defendants for said sum of \$845.20, as costs in said last named court, was not conditioned to abide the event of the suit, or otherwise, but was an absolute and final judgment, and in said *by said* judgment it was adjudged and decreed that these defendants recover said sum and have execution therefor.

b. That the item herein objected — is the amount so paid by plaintiff to defendants in satisfaction of the judgment of said Supreme Court, and that the same were allowed and adjudged
1056 unconditionally and by the final judgment of said Supreme Court, as set forth in ground a herein, and that defendants were absolutely entitled to recover said sum of plaintiff, without regard to the result of the second trial of said cause, and that the amount so paid is not taxable as costs against these defendants upon the second trial of this cause.

c. That the item herein objected and excepted to is not properly taxable or allowable as costs against the defendants under the statutes of this Territory.

d. That said item is not costs incurred in this court but in the Supreme Court of this Territory, and are not taxable as costs in this court.

e. That final judgment having been rendered and entered in said Supreme Court in favor of these defendants for the costs of said court, without condition, this court has no power to tax or allow any of the items of costs in said Supreme Court against these defendants, or to render judgment therefor against these defendants upon the second trial of this action.

1057 f. That the item herein objected and excepted — are not costs incurred in this court, and are not the fees of officers, or witnesses, costs of taking depositions, compensation of referees or disbursements made or incurred pursuant to any order of court

or agreement of the parties, and are not authorized to be taxed or allowed against these defendants under the statutes of the Territory of Arizona.

II.

Defendants object and except to the item "Clerk Supreme Court costs, \$69.90," upon all the grounds hereinbefore set forth, and upon the following further grounds:

a. That the amount specified in the said item is the fee of the clerk of the Supreme Court of this Territory upon the appeal taken by these defendants from the judgment rendered upon the first trial of this action incurred by the plaintiff, the appellee in said Supreme Court, and that plaintiff was not the prevailing party upon said appeal and is not and was not entitled to the taxation or allowance of said item as costs against these defendants.

1058 b. That said item is not costs incurred in this court, but upon the unsuccessful defense to the appeal taken by these defendants from the judgment rendered upon the first trial of this action, and that said item is not taxable or allowable as costs against these defendants in this court.

III.

Defendants object and except to the "Suppl. Abstract of Record, \$37.50," upon all the grounds hereinbefore set forth, and upon the further ground that the supplemental abstract referred to in said item is a supplemental abstract of record filed by the plaintiff herein in said Supreme Court upon the appeal taken by these defendants from the judgment rendered upon the first trial of this cause, and that the same is a disbursement incurred by the plaintiff upon his unsuccessful defense of said appeal in said Supreme Court, and was not incurred in this court, and is not taxable or allowable as costs in this court.

IV.

Defendants object and except to the item "Abstract of
1059 testimony in re justification of sureties on appeal bond,

\$19.60," on the ground that such item was not a disbursement incurred in this court, but was incurred by the plaintiff in and about certain exceptions filed by him to the sufficiency of the sureties upon the appeal bond filed by the defendants upon the appeal taken from the judgment rendered upon the first trial of this cause, and that said item is not taxable or allowable in this court against these defendants, and also upon all the grounds hereinbefore set forth.

V.

Defendants object and except to the item "Printing Brief (more than 20 pages), \$20.00," upon the grounds set forth in paragraph I of these exceptions, and upon the further ground that the brief referred to in said item was the brief of the plaintiff as appellee in said Supreme Court, and that the said item is not taxable or allowable as costs against these defendants in this court.

VI.

Defendants object and except to each and all the following items, viz:

1060	Paid attorney for defendants judgment for costs assessed by Supreme Court in remittitur.....	\$845.20
	Clerk Supreme Court costs	69.90
	Suppl. Abstract of Record	37.50
	Abstract of testimony in re justification of sureties on appeal bond	19.60
	Printing brief (more than 20 pages)	20.00

upon each and all the grounds set forth in paragraph I hereof.

VII.

Defendants object and except to the following item, "Copy of evidence as per stipulation of parties, \$541.80," on the ground that there is and was no stipulation or agreement of the parties or order of the court which authorizes the taxation or allowance of said item, and that said item is not legally taxable or allowable as costs against the defendants in this action.

Wherefore, defendants pray that each and all of the items herein objected and excepted to be disallowed, and that the costs in this action be reduced to the extent of each and all of such items, 1061 and that the statement of costs and the judgment herein be corrected by deducting each and all of such items, and for such further order in the premises as may be just and proper.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for the Defendants.

Filed August 18, 1908.

Exhibits Omitted from Original Abstract of Record.

PLAINTIFFS' EXHIBIT 2.

Whereas, Louis Zeckendorf and Albert Steinfeld have heretofore been co-partners in the business conducted at Tucson, Arizona, under the firm name and style of L. Zeckendorf & Co., and whereas for the better government and security they have deemed it advisable and to their best interests to formulate their covenants and agreements, and whereas they have ascertained by careful inventory and a valuation taken on the 31st day of January, 1893, 1062 as appears on their books of account as kept at Tucson that their present joint capital in said business is the sum of \$393,519.65, contributed as follows, to-wit:

Louis Zeckendorf	\$259,251.24
Albert Steinfeld	134,268.41

Now therefore, for and in consideration of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged,

it is hereby covenanted and agreed by and between the parties that the basis and terms of their co-partnership shall and are the following Articles of Agreement, and each forever quitsclaims and releases unto the other all claims, considerations and covenants not herein declared.

Article 1.

That the firm name and style shall be as heretofore, L. Zeckendorf & Co., and the principal place of business at Tucson, Arizona, until otherwise mutually agreed.

Article 2.

That the duration of this co-partnership shall be three years unless sooner terminated by mutual agreement.

1063

Article 3.

That the respective interests and capital of said business are as follows:

Louis Zeckendorf	\$259,251.21
Albert Steinfeld	134,268.41

Article 4.

That the profits and losses shall be shared in the following proportions, to-wit:

Louis Zeckendorf	55 per cent.
Albert Steinfeld	45 per cent.

Article 5.

That both of the parties hereto shall have at all times free access to all books of account and records of the business, and at the end of each fiscal year, or as soon thereafter as possible, an inventory shall be made of all the assets and liabilities of the firm, and a statement shall be prepared showing the condition of the business at that date and the profits or loss for the year last past.

Article 6.

That of the profits so ascertained $\frac{1}{3}$ shall be credited to an account entitled "Undivided Profits Account," and the remaining $\frac{2}{3}$ shall be credited as follows, to-wit:

To private account, Louis Zeckendorf	55%
Albert Steinfeld	45%

Article 7.

That the losses so ascertained shall be charged to the said "Undivided Profits Account," so long as the said account has a credit, but

should the credit thereof become exhausted by reason of such charges then the said excess of losses shall be charged to the accounts of Louis Zeckendorf and Albert Steinfeld in the same proportion as the profits would have been.

Article 8.

That two accounts shall be opened for each of the parties, to-wit:—a "Capital Account" and a "Private Account." The respective Capital accounts shall evidence the capital invested by each by original investment as herein and contributions as hereinafter provided. The private accounts shall show the withdrawal of the parties and their credits and debits from profits and losses as herein provided in Articles 6 and 7, and interest shall be computed on both 1065 debits and credits of said private accounts at the rate of 6 per cent. per annum, and charged or credited thereto at the end of each fiscal year, the said interest being entered to the "Undivided Profits Account," and not to the operative interest account of the business, provided that the joint credit balance of said private accounts reach a total in excess of \$10,000.00 at the end of any fiscal year there shall be transferred to the respective capital accounts an amount from each proportionate to the respective interests of the parties, the proportion being based upon the account that has the smaller balance to its credit.

Article 9.

That the parties hereto shall formally execute their letters testamentary appointing executors of their estates, and in said letters they shall make special reference to this agreement of co-partnership as specifically determining the rights and interests of the parties in and to the said business.

Article 10.

That these articles of agreement may be altered or amended by mutual agreement in writing and in no other way.

1066

Article 11.

That in the event of the demise of one of the partners hereto prior to the dissolution of this co-partnership and upon the qualification of his executor or executors one of the said executors and the surviving partner shall act as appraisers of the value of the said business with the power to select a third party who shall be agreeable to both of them, in the event of their disagreement; provided that the said executor or executors may select an appraiser to act in their place and stead, and the decision of said appraiser so selected shall be final in all matters of disagreement as aforesaid.

Article 12.

That the said appraisers shall also render a full statement of the present value of all the liabilities of the business showing the nature and origin of each of them, and said report of liabilities shall be held and received as a true showing as in the case of the report of assets.

Article 13.

That the excess of assets ascertained from the foregoing report shall be received and held as the present value of the said
1067 business and shall not be afterwards impeached.

Article 14.

That the surviving partner shall have the first option of purchasing the entire interest of the estate of the deceased partner in and to the said business, or the control of any part thereof on the basis of its value as ascertained from the reports of the appraisers as provided at his election, and upon the terms following, to-wit: $\frac{1}{3}$ cash and the balance in one, two and three years' time with interest at 6 per cent. per annum on deferred payments, giving security therefor satisfactory to the appraisers.

Provided (a) That the same terms shall hold for any proportion of the entire interest of the estate in the said business that he may select to purchase.

(b) That if within sixty days after the signing of said appraisers' reports the surviving partner shall fail to use the said option the said executor or the heir or heirs of said deceased partner shall have a like option for an equal period of time and upon the same terms.

(c) That if the said option is waived on both sides by
1068 notice or expiration of time then it shall be competent for said survivor and the said executor or said heir or heirs to settle by agreement as to the disposition of said business and interests, using the same appraisalment or one similarly made, as a basis for a just valuation of the business.

Article 15.

That in the event of the dissolution of this co-partnership prior to the term thereof, and otherwise than by the demise of one of the partners, then the settlement of the business, unless otherwise provided by mutual agreement, shall be made upon the basis of an appraisalment made as heretofore provided.

Article 16.

That all real estate, mines and choses in action heretofore and hereinafter held for convenience and transfer in the individual names of the parties hereto and which properly belong to the firm shall be deemed as held in trust for the firm by the said parties.

Article 17.

That the said Louis Zeckendorf shall have the right to withdraw from his capital the amount of \$25,000.00, at such times
1069 and in such sums as the condition of business may warrant.

Tucson, Arizona, May 26, 1893.
(Signed)

LOUIS ZECKENDORF.
ALBERT STEINFELD.

In the presence of
J. GEORGE HILZINGER.

PLAINTIFFS' EXHIBIT 3.

This Agreement, Made this 7th day of August, 1899, between Louis Zeckendorf of the city, county and state of New York, and Albert Steinfeld, of the city of Tucson, Arizona Territory, Witnesseth:

Whereas, The parties hereto have been doing business in the said city of Tucson, under the co-partnership name of L. Zeckendorf & Co., under the terms of certain articles of co-partnership in writing, dated at Tucson, Arizona, May 26th, 1893; and

Whereas, The parties hereto desire that the said articles of co-partnership shall be continued in force, as heretofore, subject, however, to the modifications and additions hereafter set forth,

Now Therefore, It is mutually agreed that the said articles of co-partnership of date May 26th, 1893, shall continue in force, subject, however, to the following modifications and additions to-wit:

I.

It is hereby agreed that Article I of said articles of co-partnership, of date May 26th, 1893, shall — modified to read as follows:

Article I.

That the firm name and style shall be as heretofore L. Zeckendorf & Co., and its principal place of business shall be at Tucson, Arizona, until mutually otherwise agreed. The business of the said co-partnership shall be the conducting and carrying on of a general merchandise business at Tucson, Arizona. The said co-partnership shall not engage in business at any other place, except by mutual consent of the parties hereto, first expressed in writing.

It is further — that the property and assets of the said co-partnership shall be deemed and considered to be only such as at present appears on the books of the said co-partnership, and also such as may hereafter be acquired in the carrying on of said general merchandise business.

II.

It is further agreed that Article 2 of this copartnership shall be modified so as to read as follows:

Article 2.

That the duration of this co-partnership shall be subject to the pleasure of either party hereto; and either party shall have the right to dissolve the same; provided, however, that the party so wishing to dissolve the same shall first serve notice in writing to that effect upon the other party at least six months before the dissolution can be effected.

III.

It is further agreed that Article 17 of said Articles of Co-partnership shall be and the same hereby is cancelled and annul-ed.

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IV.

It is further agreed that the following articles and provisions shall be deemed and considered, and the same hereby are incorporated and made a part of said Articles of Co-partnership of date May 26th, 1893, to-wit:

Article 18.

All books of account, both debits and credits, of the said co-partnership, shall be kept in Tucson; and all payments for or on account of the business or obligations of said co-partnership shall be made from Tucson. This provision is to go into effect on or before January 1st, 1900, when the keeping of any books of account in the New York office of said co-partnership shall be discontinued. Said co-partnership may keep an office in the city of New York, for the convenience of its officers, and to facilitate the making of financial arrangements from time to time; also for the purchase of goods by the employment of A. H. Couran or some other suitable person, who shall be employed either on salary or to be paid by commission, and in regard to which the details are to be arranged before January 1st, 1900.

1073 On or before January 1st, 1900, all business assets and liabilities of the said co-partnership are to be transferred to Tucson, at which place, in the future, all settlements are to be made for any firm obligations.

Article 19.

Commencing January 31st, 1900, there shall be allowed to Albert Steinfeld a salary of six thousand dollars (\$6,000.00) per annum, payable monthly at the rate of five hundred dollars (\$500.00) per month, for his services as managing partner at Tucson; which said salary shall be deemed and considered an expense of conducting the firm business, and not as a part of the profits.

Article 20.

Neither party hereto shall have the right to withdraw any part of his capital invested in said co-partnership, during the continuance of the co-partnership, except upon mutual consent in writing of both parties.

Article 21.

The said Louis Zeckendorf shall not withdraw in any one year out of the profits that may have accrued to him an amount in
1074 excess of \$12,000.00; and said Albert Steinfeld shall not withdraw in any one year out of the profits that may have accrued to him, an amount in excess of \$9,818.00; provided, however, that either party may withdraw profits in excess of the amounts

just above stated upon his first having obtained the consent in writing of the other party to such withdrawal; the provisions of this article shall be in force from January 31, 1899.

Article 22.

The account at present appearing on the books of the said co-partnership in the New York office and therein designated as "Ray Copper Commission Account" and amounting to the sum of \$29,792.66 100; also the account appearing on said books designated as follows, "Suspense Account," and amounting to the sum of \$18,460.85 100 shall be entered on the books of the said co-partnership at Tucson as a loss made by said co-partnership in the conducting of its said business.

Article 23.

The proceeds of the sale of the Ray Group of Mines, after paying the account said properties owe, as shown on the books in Tucson, whether in money or in shares of stock, shall be deemed and considered as profits, and said profits shall be divided between the parties hereto, share and share alike, and shall not go into the said co-partnership business, but shall remain the personal and individual profits of the respective parties hereto.

Article 24.

The proceeds which may arise from the sale of any mines or mining properties, of the said co-partnership, shall be applied as follows:

1. To the re-payment of the said co-partnership of such amounts as the mines or mining property so sold may owe on the said books to said firm.

2. The remaining proceeds of such sale shall be considered as profits, whether the same be in money or shares of stock, and such profits shall be divided equally between each of the parties hereto, share and share alike, and such profits shall not go into the business of such co-partnership, but shall remain the individual property of each of the respective parties hereto.

It is further agreed, however, that the shares of stock of the Copper Queen Mining Company, sold some time ago, are not to be included within the terms of this Article, but the amount of such sale is to be credited to the Tucson house on the books of the firm in its New York office, in the same manner as it has already been charged on the books of the co-partnership at Tucson.

In witness whereof, the parties hereto have hereunto placed their hands and seals the day and year first above written.

[SEAL.]

ALBERT STEINFELD.

PLAINTIFFS' EXHIBIT 4.

Agreement.

It is hereby agreed: That the provisions of Article 21, of the articles of co-partnership, of date August 7th, 1899, between the undersigned, shall apply to and include all shares of stock and bonds of all mining companies, which are now owned by or held in
 1077 trust for said co-partnership firm, as well as all such shares and bonds as said copartnership may hereafter acquire.

Dated this 4th day of November, A. D. 1901.

ALBERT STEINFELD.

PLAINTIFFS' EXHIBIT 5.

It is hereby agreed: That the provisions of Article 21, of the articles of co-partnership of late May 26, 1893, between the undersigned, and the modification thereof of date August 7, 1899, shall apply to and include all shares of stock and bonds of all mining companies which are now owned by, or held in trust for said co-partnership firm, as well as all such shares and bonds as said co-partnership may hereafter acquire.

It is further agreed: That if the proceeds which may arise from the sale of any mines, mining properties, mining stock or bonds owned by, or held in trust for said co-partnership, shall be insufficient to repay in full such amounts as such mines, mining
 1078 property, mining stock or bonds so sold may owe on the books to said firm, then the deficit shall be deemed a loss, and shall be borne by each of the parties hereto share and share alike.

Dated this 13th day of June, 1902.

ALBERT STEINFELD.
 LOUIS ZECKENDORF.

1079 And on to-wit: the twelfth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:—

Title of Cause.

At this day, it is ordered by the Court that the Stipulation between the respective parties hereto, "that a supplemental abstract of record be filed, consisting of the amended pleadings, the findings, judgment, motions for new trial, minute entries and stipulations made since the former trial, and that such abstract of record, together with the abstract of record filed upon the former appeal shall together constitute the abstract of record upon these appeals, subject to the right of either party to file such additional or supplemental

abstracts of record as they may under the law have the right, be and the same is hereby, confirmed.

And on the same day to-wit: the twelfth day of January, 1909, being one of the regular juridical days of the January Term of said court, 1909, the following order was had and entered of record in said cause in words and figures following, to-wit:—

1080 Title of Cause.

At this day, on motion of Mr. F. E. Curley for Appellant herein, it is ordered by the Court that oral argument be granted in this cause and the hearing set for January 27, 1909.

And on to-wit: the twenty-seventh day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:—

Title of Cause.

This cause coming on at this time for hearing was argued by Mr. Frank H. Hereford and Mr. E. S. Meserve for Louis Zeckendorf, and by Mr. E. S. Ives for Albert Steinfeld, et al., and cause ordered submitted.

And on to-wit: the twentieth day of March, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:—

1081 In the Supreme Court of the Territory of Arizona.

No. 1101.

LOUIS ZECKENDORF, Appellant,
vs.
ALBERT STEINFELD et al., Appellees.

Appeal from District Court, Pima County.

Before Mr. Justice Campbell.

Mr. Edwin A. Meserve and Mr. Frank H. Hereford, for appellant.
Mr. Francis J. Heney and Mr. Eugene S. Ives, for appellees.

SLOAN, J.:

This is the second appeal which has been taken in this cause to this court. We reversed the case on the first appeal upon the ground that the judgment which was entered in the court below was not sustained by the findings. 86 Pac. 7. The cause was remanded

for a new trial. Upon the second trial by stipulation of counsel the case was submitted upon the evidence put in upon the first trial except that certain testimony, deemed by the parties inadmissible under the issues, was eliminated. As this record is voluminous, and as both parties have appealed from the judgment, a full statement of the facts is made necessary for a complete understanding of the questions presented for our determination.

1082 Louis Zeckendorf, as a stockholder of the Silver Bell Copper Company and in its behalf, brought this suit against Albert Steinfeld, R. K. Shelton and J. N. Curtis, individually and as officers and directors of said company, and against the Mammoth Copper Company, to recover for said Silver Bell Copper Company the sum of \$338,710.15 and 300 shares of the stock of the latter which he alleged had been wrongfully appropriated by the defendant Steinfeld, and to be in his possession, and which rightfully was the property of the said company; that this wrongful appropriation was made through the aid and assistance of the defendants, Shelton and Curtis, as directors of the Silver Bell Copper Company. The plaintiff prayed for an accounting, the return of the money and shares of stock alleged to have been thus appropriated, and for costs, attorney's fees and the appointment of a receiver. The answer of the defendant contained a general and specific denial of the wrong doing complained of; and set up, that the money and shares of stock sued for were the property of Steinfeld and rightfully in his possession; that this money represented in part the proceeds from a sale of mining property which had been purchased by him and held in his own name and which had been sold in conjunction with property belonging to the Silver Bell Copper Company; that the remainder of the money had been rightfully paid Steinfeld in the way of dividends upon the shares of stock of the Silver Bell Copper Company

1083 owned by him and standing in his name, including the 300 shares of stock mentioned in the complaint and that these dividends had been declared from the proceeds derived from the sale of the mining property belonging to the company. The court below gave judgment for the plaintiff for the sum of \$20,800.00 being the amount of the dividends declared upon said 300 shares of stock after deducting a certain sum paid out by Steinfeld in the purchase of the same from the original owner, and denied him any relief upon the cause of action set up in the complaint based upon the alleged misappropriation of the proceeds of the sale of the mining property claimed by Steinfeld as his individual property, the title to which was in his name. The court appointed a receiver to disburse the money thus adjudged to be wrongfully appropriated among the stockholders of the Silver Bell Copper Company and to close up the affairs of the latter company. From this judgment both parties have appealed.

The court found the facts to be as follows:
From 1878, and during all the times herein mentioned, the plaintiff, Louis Zeckendorf, and the defendant, Albert Steinfeld, were partners engaged in the mercantile business in Tucson under the name of L. Zeckendorf & Company. The defendant, Stein-

feld, under the terms of the partnership, was the active manager and in the control of the business of the firm. The plaintiff was a resident of the City of New York and only occasionally 1084 visited the Territory. As ancillary to their business the firm became more or less interested in various mining enterprises. A property situated in Pima County, known as the Old Boot mine, prior to January, 1899, was held by Steinfeld as trustee for William Zeckendorf and his wife, Julia Zeckendorf. One Carl Nielsen had been given a contract by Steinfeld for working and operating said property on a royalty and had become indebted to the firm of L. Zeckendorf & Company in the operation of the mine. On the last mentioned date, in order to protect the firm on account of this indebtedness Steinfeld caused a corporation to be formed under the name of the Nielsen Mining & Smelting Company, to which was transferred Nielsen's interest under this contract, the machinery and other personal property owned by him and used in its operation, in consideration of all of its capital stock and the assumption by the corporation of his debts to L. Zeckendorf & Company. At the time of the organization of the company Steinfeld, as trustee for William and Julia Zeckendorf, gave the corporation an option to purchase the Old Boot mine for \$25,000.00 payable in installments of \$2,500.00 each. Nielsen assigned to L. Zeckendorf & Company 670 shares of the capital stock, and to Steinfeld as trustee 30 shares of the capital stock, retaining for himself the balance of 300 shares of the capital stock. The firm of L. Zeckendorf & Company put one share in the name of the defendant Shelton, to qualify 1085 him as a director, and gave 170 shares to defendant Curtis, in consideration of services thereafter to be performed by the latter for the company, and retained 499 shares for itself. The authorized capital stock of the company was \$25,000.00. The defendant Shelton was an employee of L. Zeckendorf & Company, and the defendant Curtis had charge of the mining business of the firm. Curtis was elected director and president of the company, and Shelton director and secretary. Nielsen was elected a director and became manager and superintendent of the company. Steinfeld, while not an officer or director of the company, was, never the less, recognized as the ruling manager of the corporation and was, in fact, in control, through the officers, of its affairs. The name of the corporation was subsequently changed to the Silver Bell Copper Company, and we will hereafter speak of it by this name.

Adjacent to and surrounding the Old Boot Mine was a group of mining claims known as the English group which was owned, at the time of the organization of the corporation, by residents of England. On the first of January, 1900, these mining claims were relocated by one Francis and one Volkert under the claim that the title of the English owners had become forfeited. Steinfeld, through Curtis and his relations to the corporation and from personal inspection, learned that the English group contained ore bodies of great value, and that the ore body in the Old Boot mine extended 1086 into the ground embraced in the English group, and was advised by Curtis that it was desirable that the title to the

English group should be acquired so that the two properties might be held and sold as one group thereby increasing the value of the company's property. Early in the year 1900 Steinfeld became dissatisfied with Nielsen's management of the property and determined to get rid of him by buying his shares of stock. Under the advice of Steinfeld the directors discharged Nielsen and appointed Curtis in his place and stopped work on the Old Boot mine.

The court found, that Steinfeld's purposes in closing the mine were to effect a purchase from Nielsen of the 300 shares of stock held by him, and also that the English group of mines might be purchased from the English owners, as well as the Francis-Volkert title, at a nominal or small sum; that although the mine was paying, and at the time worked at a profit, its closing down was to prevent the owners of the English group from obtaining knowledge that the ore body of the Old Boot property did and would extend into the ground covered by the English group.

At the time of the closing down of the Old Boot mine the Silver Bell Copper Company was indebted to L. Zeckendorf & Company about \$30,000.00 in excess of the value of matte and bullion held by the latter as security for the company's indebtedness. On 1087 May 16th, 1900, Steinfeld purchased the title held by Francis and Volkert to the English group; at the same time he organized the Mammoth Copper Company for the purpose of taking over this title. The stock of this company was in fact owned and held by Steinfeld individually. On June 29th, 1900, an agreement was entered into by and between Steinfeld and the Silver Bell Copper Company, as parties of the first part, and Nielsen and his wife, as parties of the second part, whereby the latter was to sell to the former the 300 shares of stock belonging to Nielsen, together with an interest in two mining claims adjoining the Old Boot in consideration of \$2,000.00 to be paid Nielsen in cash and the further sum of \$10,000.00 which was to be paid out of the proceeds of a sale of said mine. After this agreement was executed the 300 shares of stock were thereupon transferred on the books of the company to Steinfeld as trustee. In December, 1900, Steinfeld went to England and there acquired the title to the English group from the English owners and took the title in his own name. He paid for this title with his own money.

The court found that Steinfeld, in making the purchases of the Francis-Volkert title and of the English title to the English group, intended that the property should be his own and not the property of the Silver Bell Copper Company, but did have the purpose and intent of offering to the company the opportunity to take over the title in consideration of its reimbursing him for his out- 1088 lay in acquiring said title; that he expected the corporation would do this, but, should it not, he would then hold them as his own. Soon after the purchase by Steinfeld of the English title Curtis consulted with S. M. Franklin, the attorney for the Silver Bell Copper Company, and who was also the attorney for L. Zeckendorf & Company, and the defendant Steinfeld, with regard to the ownership of the 300 shares of stock purchased from Nielsen

and the English group. Steinfeld was then claiming to be the owner of both the stock and the mines. As a result of this action of Curtis, Franklin told Steinfeld that under the circumstances of his purchases he held both the stock and the English group as trustee for the Silver Bell Copper Company; that because of his relation to the company he had neither the right to purchase the stock or mines for himself nor the right to compel the company to assume the purchases without the consent of its stockholders at a meeting at which some one other than Steinfeld should vote the shares belonging to L. Zeckendorf & Company, and that if the corporation should then refuse to ratify the transactions Steinfeld could then rightfully thereafter hold the stock and mines as his own. Acting under this advice on July 15th, 1901, Steinfeld handed to Shelton, secretary of the company, an agreement signed by himself and addressed to the company, in which he recited in detail the circumstances of his purchase of the English group of mines and
1089 of the Nielsen stock and the interest in the mining claims held by him, and the terms under which the Nielsen stock purchase was made, and stated his willingness to sell and convey both the English group and the shares of stock to the company upon its paying him the money which he had expended in the purchase thereof, with interest, and upon its assuming and guaranteeing to carry out the terms of the Nielsen contract of purchase, as well as the contract of purchase of the Francis-Volkert title, on or before October 15th, 1901, and would further agree in writing to do the annual assessment work on the mines. It was further expressed in the agreement that if the company should fail to carry out the terms of the proposition then Steinfeld would thereafter hold the property as his own. After the receipt of this document from Steinfeld the board of directors of the company on the same date adopted a resolution calling for the holding of a stockholders' meeting to take appropriate action on Steinfeld's proffer, but no stockholders' meeting was in fact called or held under this resolution and no action was taken by the stockholders under it. On October 1st, 1901, at a meeting of the stockholders of the company it was agreed by Steinfeld, in consideration of the corporation doing the assessment work on the mines for the years 1900, 1901, 1902, to extend his proposition of July 15th, 1901, to September 15th, 1902. It was resolved at this meeting that a stockholders' meeting should be
1090 called to act on Steinfeld's proposition not later than September 15th, 1902, but no stockholders' meeting was ever called or held for this purpose, nor was any action taken by the stockholders under this resolution. During all the time that the proposition of Steinfeld was pending the Silver Bell Copper Company was in possession of the English group and worked and operated it in connection with the Old Boot Mine. In 1901 and at other times Curtis, under the direction of Steinfeld, made various maps and reports of the property in which the English group was spoken of as part of the Silver Bell Copper Company's property. These maps and reports were sent to plaintiff and others, and various efforts made by Steinfeld to sell the property as a whole, including

the English group. As the result of these efforts to sell, on May 20th, 1903, the Imperial Copper Company entered into an agreement with the Silver Bell Copper Company and with Steinfeld and the Mammoth Copper Company for the purchase of the entire property for the sum of \$515,000.00. In this agreement Steinfeld individually guaranteed the title to the mines for a definite length of time. The terms of the sale called for the payment of \$115,000.00 cash and four notes of \$100,000.00 each made payable to the Silver Bell Copper Company. It was further agreed that these notes and their proceeds should be held by Steinfeld until released from his personal obligation in guaranteeing said title. On the same day an agreement in writing was executed by J. N. Curtis as President of the Silver Bell Copper Company and in its name, and by Steinfeld and the Mammoth Copper Company, which read as follows:

"This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phoenix, Ariz., and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of the sale; and

"Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making this sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

"Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be paid by the said Albert Steinfeld, as trustee, and as security for, and indemnity against loss, damage or

expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or
1093 on account of any such obligations or liabilities so assumed by him."

After the agreement of sale had been executed and on the same day the board of directors of the Silver Bell Copper Company met to take action upon the matter of the sale and the ratification of the above agreement. The minutes of the meeting recite that the President reported the fact of the agreement of sale and the terms thereof and also of the agreement between the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company guaranteeing Steinfeld from any loss by virtue of his guarantee agreement with the Imperial Copper Company; they further recite that Steinfeld had again submitted for acceptance the proposition which had theretofore been submitted by him on the 15th day of July, 1901, and later extended until September 15th, 1902, with the additional provisions that the company should assume and pay a commission which Steinfeld had agreed to pay for negotiating the sale to the Imperial Copper Company, and should be indemnified against loss by reason of another asserted claim for a commission, and further that the company should indemnify him against loss, damage or expense by reason of his having guaranteed the titles to the mines sold to the Imperial Copper Company as set forth in the guarantee agreement between the Silver Bell Copper Company, the Mammoth Copper Company and Steinfeld. The minutes further

1094 recite that thereupon a resolution was adopted accepting Steinfeld's proposition and ratifying, approving and confirming the sale to the Imperial Copper Company and the agreement of indemnity made by the company with the Mammoth Copper Company and Steinfeld. After the execution of these agreements and the ratification of the same by the board of directors the proceeds of the sale, including the promissory notes, were turned over to Steinfeld under the agreement and by him deposited in a bank in San Francisco, except the sum of \$51,500.00 which had been attached in a suit against the Silver Bell Copper Company which was filed after the sale had been made to the Imperial Copper Company. The plaintiff, Zeckendorf, being dissatisfied with the disposition made of the proceeds of the sale brought a suit in San Francisco on behalf of the company to recover the same. On December 26th, 1903, a meeting of the stockholders of the Silver Bell Copper Company was held in Tucson at which both Zeckendorf and Steinfeld were present and an attorney representing each, as were also Shelton and Curtis. The purpose of this meeting was to adjust the difficulties which had arisen between Zeckendorf and Steinfeld growing out of the disposition of the proceeds of the sale and the litigation which had been instituted by Zeckendorf in relation thereto. At this meeting a resolution was passed rescinding and

annulling the agreement of May 20th, 1904, and the resolution of the board of directors of the same date. In the resolution was set forth a copy of the agreement of May 20th, and the resolution of the board specifically referred to and both were declared to be null and void. This action of the stockholders was taken with the consent and acquiescence of all the parties to the agreement of May 20th. After the adjournment of the stockholders meeting the board of directors of the Silver Bell Copper Company met and adopted a similar resolution. At this meeting Steinfeld resigned as Treasurer of the company and Curtis was elected Treasurer in his stead. Steinfeld then paid to Curtis the sum of \$18,117.00 which had theretofore been paid to him under the agreement and resolution of May 20th, and turned over to Curtis all the funds in his hands of the proceeds of the sale except the sum of \$51,500.00 which had been garnisheed in said suit, and gave to Curtis an order upon the Bank of California to deliver the money and notes which had been deposited by him as aforesaid. On January 16th, the board of directors of the Silver Bell Copper Company met and adopted a resolution partitioning the proceeds of the sale to the Imperial Copper Company then in the treasury of the Silver Bell Copper Company between Steinfeld and the company. Under the terms of this partition Steinfeld received the sum of \$145,743.75 and one of the promissory notes for \$100,000.00 given by the Imperial Copper Company as the amount due him of the proceeds of the sale of the English group of mines, the title to which he held. There was present at this meeting Shelton, Curtis, Steinfeld and Eugene S. Ives, the latter acting as the attorney of Steinfeld. On the 20th day of January, 1904, the directors of the company again met and passed a resolution declaring a dividend of \$111.00 per share of the capital stock of the Silver Bell Copper Company. Under this dividend the sum of \$33,300.00 was paid Steinfeld on the 300 shares standing in his name as trustee and which had been purchased from Nielsen.

The court in addition to these facts found that all the money paid out by Steinfeld in the purchase of the Francis-Volkert title and the English title to the English group of mines, and the \$2,000.00 paid in the purchase of the 300 shares of stock was the personal money of Steinfeld, and that at no time prior to the 20th day of May, 1903, did the Silver Bell Copper Company offer or agree to repay Steinfeld any of said money, or to assume any obligation which Steinfeld had incurred in the purchase of the Francis-Volkert title.

As we have stated, both parties have appealed from the judgment.

We will consider first Zeckendorf's appeal. His essential grievance is in the refusal of the trial court to grant any relief upon the cause of action set forth in his complaint based upon the claim that Steinfeld, at the time of the sale to the Imperial Copper Company, held the legal title to the English group of mines as the trustee of the Silver Bell Copper Company. Counsel for appellant, Zeckendorf, present two views of the case bearing upon this point.

They urge first, that under the facts and circumstances surrounding the purchase of the English group of mines by Steinfeld,

and from his expressed intention at the time, he should be held to be a trustee *ex maleficio* from the time of the purchase; they also urge that if he was not a trustee from the time of the purchase he became such under the agreement of May 20th, 1904, and the resolution of the directors of the Silver Bell Copper Company of that date, accepting his proffer to renew the option of July 15th, 1901. We will consider these in their order.

The law is that one may not purchase and hold, as his own, property which he is in duty bound to purchase and hold for another.

Wing vs. Dillon, 27 Miss. 494.

Davis vs. Hamlin, 108 Ill. 39.

Gardner vs. Ogden, 22 N. Y. 327.

This rule applies to officers and directors of a corporation as to other persons sustaining fiduciary relations to others. Whether in any case an officer of a corporation is in duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the corporation has an interest actual or in expectancy in the property or whether the purchase of the property by the officer or director may hinder or defeat the plans and purposes of the corporation in the carrying on or development of the legitimate business for which it was created.

Trice vs. Comstock, 121 Fed. 620.

We think the rule as thus stated is as broad as the authorities will sustain. Was Steinfeld in such relation to the Silver Bell Copper Company at the time of his purchase of the English group of mines as to have made it his duty either to purchase the same for the company or to refrain from purchasing it for himself? Steinfeld was not at the time a director of the Silver Bell Copper Company, yet, as found by the court, as managing partner of L. Zeckendorf & Company, he dominated the affairs of the corporation through its board of directors. This being so he should be held doubtless to the same rule governing persons holding fiduciary or confidential relations to a corporation as though he were himself an officer or director. He obtained knowledge of the value of the English group of mines wholly by reason of his connection with the affairs of the company and largely from the reports of Curtis, the superintendent. In purchasing the property he had in mind what had previously been told him by Curtis to the effect that the acquisition of the English group and the joining of it with the company's property in case of sale would greatly add to the value of each. As against this view it should not be overlooked that at the time of the acquisition of the titles to the English group by Steinfeld the Silver Bell Copper Company was indebted to L. Zeckendorf & Company in an amount exceeding its capitalization, with no available resources which could be utilized to effect a purchase of the English group. Steinfeld did not prevent the company from making the purchase by any representation to the officers of the company or to the board of directors that he intended to and

would obtain the property for the company. It is urged by counsel for appellant that he was in a situation to have made the purchase on behalf of the company by personally advancing the money needed for that purpose, or by obtaining the same from the firm of L. Zeckendorf & Company. The answer to this is, that to hold that an officer or director of a corporation is under any duty to such corporation to loan money or to purchase out of his own funds property for the use of the corporation would be enlarging the duty of an officer or director of a corporation beyond any point to which the law of trust has ever gone. The same is true as to the suggestion that Steinfeld should have used the money of L. Zeckendorf & Company for that purpose; even had he authority under the terms of the partnership to use money for such purpose, he was certainly under no obligation to the corporation to do so.

It is further urged that Steinfeld's action, in causing the closing down of the Old Boot mine prior to his purchase of the English group, was unjustifiable, and an injury to the company, and was intended by him to make it easy to purchase the English group of mines and to affect the price for which the property could be bought. These arguments would be forceful if it could be determined from the facts that the closing down of the Old Boot mine prevented the corporation from obtaining the English group or in any way changed the relations of the corporation to the owners of the English group as to hamper or impede the corporation in any plan or purpose it had in relation thereto; further, it is not apparent, either in the findings or elsewhere in the record, that the closing down of the Old Boot mine did, as a matter of fact, have any influence over the minds of the owners of the English group to induce them to sell to Steinfeld, or had any influence over the price for which they sold, even if we should regard either of these matters as bearing upon the duty of Steinfeld to the Silver Bell Copper Company in the matter of the purchase. Giving due weight to the facts connected with the purchase of the English group by Steinfeld, and the relations of Steinfeld to the company at the time, it cannot be said as a matter of law that Steinfeld, in purchasing the property for himself, violated any duty he owed to the Silver Bell Copper Company. It follows, therefore, that the finding of the trial court is in this regard fully sustained.

The court found that Steinfeld, before purchasing the English group of mines, had at different times written Zeckendorf, his partner, that it was very desirable that the English group should be purchased so that it could be joined with the Old Boot property and the whole sold as one group and one property, and that it was his intention to acquire the English group for this purpose. It must be remembered that the plaintiff, Zeckendorf, is here in the capacity of a stockholder of the Silver Bell Copper Company seeking relief on behalf of the company. We are, therefore, not concerned with the question whether Steinfeld, in purchasing the property for himself, has violated any duty he owed to Zeckendorf as a member of the firm of L. Zeckendorf & Company. Steinfeld's expression of intention to Zeckendorf can have little bearing

on the question under consideration, unless it should appear that his promise to purchase for the company was made or intended to be made to Zeckendorf as a stockholder of the company, and through him to affect in some way the subsequent conduct and relations of the corporation to the property, as by inducing the company to refrain from purchasing the property or from making any effort there-to; that it was so intended or did as a matter of fact have any such effect does not appear from anything in the record we have been able to discover. Certainly the findings do not so disclose. If Steinfeld had expressed an intention directly to the officers or directors of the Silver Bell Copper Company of purchasing for the benefit of the company, the English group, such an expressed intention would not have constituted Steinfeld a trustee *ex maleficio*, unless 1102 his failure to carry into effect this intention had so changed the relations or situation of the corporation to its disadvantage with respect to the property as would amount to constructive fraud. *Scribner vs. Meade*, 85 Pac. 477.

Unless the corporation parted with something or lost or was deprived of something of value by virtue of such promise there was no fraud, and Steinfeld was in the relation of a mere volunteer, free to carry out his expressed intent or not as he might thereafter choose.

Piedmont L. & I. Co. vs. Piedmont Foundry & M. Co., 11 So. 332.

Pearson vs. Pearson, 25 N. E. 342.

Stonehill vs. Schwartz, 28 N. E. 620.

We find no ground for the application of the doctrine of equitable estoppel to this case. It is true that the Silver Bell Copper Company went into possession of the English group after its purchase by Steinfeld and was given by the latter the right of working the same and treating any ores that might be taken from the same in the company's smelter. It is likewise true that maps and reports were made showing the English group as a part of the Silver Bell Copper company's property, and that these maps and reports were made with the knowledge and acquiescence of Steinfeld for the purpose of effecting the sale of the entire property as a group. Under 103 the settled rules governing the subject of equitable estoppel, before such estoppel could be predicated upon these circumstances it should appear that the corporation had been induced thereby to expend money on the property, which it otherwise would not have spent, or to incur some liability with respect thereto under the belief, entertained in good faith and occasioned by the conduct or statements of Steinfeld, that it was the equitable owner of the property. It does not appear that the Silver Bell Copper Company expended money on the English group of mines in excess of what it got out of the property under a belief that it was the equitable owner of the same, nor does it appear that it had borrowed money or increased its indebtedness or had become obligated to others in any way upon the credit of its beneficiary or equitable ownership or the English group. The assessment work upon the English group appears to have been done by the company under an agreement with

Steinfeld, which was part consideration for his extension of the option of July 15th, 1901. Under no view of the facts and of the law are we able to arrive at any different conclusion as to the nature of the title held by Steinfeld to the English group of mines prior to May 20th, 1904, than that reached by the trial court.

The facts found by the court show that the contract of May 20th, 1904, between the Silver Bell Copper Company and Steinfeld and the Mammoth Copper Company, in which Steinfeld's renewal 1104 of his option of July 15th, 1901, with certain modifications, was accepted, among other provisions, was rescinded by the stockholders of the company with the acquiescence of Steinfeld and the Mammoth Copper Company, on the 26th day of December, 1904. Upon the first hearing of this case we held that this rescission operated to put the parties where they were before the contract was made. As the option to take over the English group given by Steinfeld had never been exercised by the company prior to May 20th, 1904, and was only exercised then through said contract, the rescission of the latter left the parties as though the contract had never been entered into. On the record, therefore, there was no acceptance of Steinfeld's proffer, and the Silver Bell Copper Company did not become an equitable or legal owner of the English group under the option, and the trial court did not err in so holding.

Counsel for appellants urge, that without regard to the question of title to the English group, the plaintiff is entitled on behalf of the company to recover possession of the whole of the money paid over to Steinfeld, for the reason that the resolution of the board of directors, on January 16th, 1905, under which the money and note were paid over to Steinfeld, was voidable if not void at the suit of any party interested therein. The reason given why this resolution

is at least voidable, is that Steinfeld was at the time a director 1105 of the Silver Bell Copper Company and voted for the resolution, and that one, if not both, of the other directors, was under his domination and control. Assuming the facts to be as thus urged, yet it does not follow that the acts done under the resolution should be declared null and void, and the money paid over to Steinfeld be required to be again placed in the treasury of the company, unless there be some unfairness in the transaction apart from the circumstances under which the resolution was made.

Twin Lake Company vs. Marbury, 91 U. S. 587.

Therefore, before Steinfeld should be required to pay back into the treasury of the company the money and note turned over to him, it should appear that he was either paid an undue amount, or that no distribution of the proceeds of the sale should, at the time, in fairness to the company, have been made. There is no showing that the amount paid Steinfeld under this resolution as his part of the proceeds of the sale due to him as the owner of the English group of mines was in excess of what he should have been paid, nor was it shown that the distribution was prematurely made. The pleading do not raise this issue, on the contrary, by stipulation of counsel, all testimony which had been put in upon the first trial as to the relative values of the Old Boot and English group of mines was elim-

1106 inated upon the ground that the complaint proffered no issue as to such values.

We come now to the question raised by the appellees under their cross appeal and that is, was Steinfeld a trustee of the Silver Bell Copper Company of the 300 shares of stock purchased from Nielsen? We think the facts fairly sustain the findings of the court that he was. The circumstances connected with the sale indicate that he bought the shares of stock for the company. The contract of purchase was in the name of Steinfeld and the Silver Bell Copper Company, and the agreement was that Nielsen was to be paid the sum of \$10,000.00 of the purchase price from the proceeds of the working of the Old Boot mine or from its sale. In addition to this the transfer of the stock was made from Nielsen to Steinfeld as trustee. Presumably, therefore, as the company was directly interested by the terms of the purchase in the sale, Steinfeld held as trustee for the corporation. The holding of the trial court that he was such trustee is thus abundantly sustained by the facts.

The action of the trial court in appointing a receiver under the circumstances is not subject to just criticism. It appears that the Silver Bell Copper Company had ceased to do business and its affairs were ready to be closed. It is not contended that any different disposition of the money found to be due from Steinfeld should or

1107 would be made by the company than is to be made by the receiver, namely, its distribution among the stockholders of the Silver Bell Copper Company.

Counsel for appellant, Zeckendorf, complain of the amount allowed them by the trial court as attorneys for the plaintiff. As this was a matter within the sound discretion of the court and as we cannot say as a matter of law that this discretion was abused, we may not modify or change the judgment in this behalf.

The judgment is affirmed.

RICHARD E. SLOAN,

Associate Justice.

We concur.

EDWARD KENT, A. J.

FLETCHER M. DOAN, A. J.

FREDERICK S. NAVE, A. J.

(Endorsed:) No. 1101. In the Supreme Court of the Territory of Arizona. Louis Zeckendorf vs. Albert Steinfeld et al. Opinion. Filed March 20, 1909. F. A. Tritle, Jr., Clerk.

1108 And on the same day to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order and judgment, *inter alia*, was had and entered of record in said cause, in words and figures following, to-wit:

(Title of Cause.)

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered, adjudged and decreed that the judgment of the District Court, herein appealed from, be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that The Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld, one of the appellants herein, and Epes Randolph and Leo Goldschmidt, sureties on the supersedeas bond herein, the amount of the judgment rendered in the trial court in favor of the defendant, the Silver Bell Copper Company.

It is further ordered, adjudged and decreed that Louis Zeckendorf do have and recover of and from Albert Steinfeld, one of the appellants herein, and Hugo J. Donau and L. Resenstern, sureties on the cost bond herein, his costs in the court below in this cause incurred.

1109 And on to-wit: the third day of April, 1909, comes the appellant by his attorneys and files in the clerk's office of said court in said entitled cause his certain Motion for Rehearing in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1101.

LOUIS ZECKENDORF, Appellant.

vs.

ALBERT STEINFELD et al., Appellees.

Motion for Rehearing.

Comes now the appellant and moves this Honorable Court for a rehearing herein for the following reasons:

I.

The Court erred in deciding that the Lower Court found as a fact that Steinfeld was advised by Curtis that it was desirable that the title to the English Group should be acquired, so that the two properties "might be held and sold as one group, thereby increasing the value of the company's property," for the reason that the finding of the Lower Court was that Steinfeld had been frequently advised and notified by Curtis that it was very desirable that said English Group of mines, so-called, should be purchased, "in order that all of the mines and mining claims surrounding said Mammoth Mine should with it constitute one group, and in order that the

1110 whole thereof might be sold as one group and one property" the overwhelming weight of testimony showing clearly that it was at all times within the minds of the parties that the English Group of mines were to be purchased for the benefit of the Silver Bell Copper Company, looking forward to a sale of that property which was at all times within the contemplation of the parties.

II.

The Court erred in giving effect to the finding of the Lower Court "that said Steinfeld in purchasing the said English Group of Mines from the said Francis and Volkert, and from the said English owners, did not purchase the same with the then intent that thereby they should become and be the property of the Silver Bell Copper Company, but at the time of the said purchases the said Steinfeld intended to take the properties as his own, but with the purpose to offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would be, and had been put to in acquiring the same," for the reason that the overwhelming weight of testimony shows that at the time these purchases were made, Curtis (who was then President of the Silver Bell Copper Company, and from whom Steinfeld received the information as to the value of the adjoining properties),

1111 and L. Zeckendorf, one of the largest stockholders in the Silver Bell Copper Company, believed, and were led to believe by Steinfeld that the purchases were to be made, and being made for the benefit of the Silver Bell Copper Company, and the testimony further shows that from Steinfeld's conduct and the correspondence at that time that he could have had nothing in mind other than the purchasing of the properties for the Silver Bell Copper Company, and the testimony further shows that the first time it ever crossed Steinfeld's mind to offer the properties to the Silver Bell Copper Company was after having been advised by his attorney, who was also attorney for L. Zeckendorf and Company and the Silver Bell Copper Company, that under all the circumstances, he Steinfeld, was a trustee for the Silver Bell Copper Company, and as such held the title for the Silver Bell Copper Company.

III.

The Court erred in deciding as a matter of fact that "in purchasing the property he, (Steinfeld) had in mind what had previously been told him by Curtis, to the effect that the acquisition of the English group and the joining of it with the company's property in case of sale, would greatly add to the value of each," for the reason that the testimony shows conclusively that at and prior to the purchase of the English group of mines, neither Steinfeld nor Curtis ever contemplated the properties being purchased or held as

1112 two separate properties, but that it was in the minds of all the parties at all times that the English group of mines should be purchased for and become a part of the property of the Silver Bell Copper Company.

IV.

The Court erred in deciding as a matter of fact that "Steinfeld did not prevent the company from making the purchase by any representation to the officers of the company, or to the Board of Directors, that he intended to, and would obtain the property for the company," for the reason that the testimony shows conclusively

that at the time Curtis conveyed the information to Steinfeld of the value of the English claims to the Silver Bell properties, and at all times thereafter, even after the purchase was made, that it was Curtis' understanding and intention, and he was led to believe that the properties were to be purchased for and to become a part of the Silver Bell Group of mines, and Curtis' contention that this was true was what brought about primarily the controversy resulting in Mr. Franklin being consulted, and his decision that Mr. Steinfeld was a trustee for the Silver Bell Copper Company, and for the further reason that Mr. Zeckendorf, one of the largest stockholders in the Silver Bell Copper Company, was informed by Mr. Steinfeld repeatedly, and led to believe at all times that Steinfeld was negotiating for the purchase of the English claims for the Silver

1113 Bell Copper Company, and that the benefits from the purchase were to inure to the benefit of the Silver Bell properties.

V.

The Court erred in deciding that Steinfeld was under no obligations to finance the purchase of the English Group of claims for the Silver Bell Copper Company, for the reason of his relations to the company at that time, and the manner in which he acquired the information as to the value of the properties, and his knowledge acquired in that manner that the property of the Silver Bell Copper Company at that time was worth very little without the English and adjoining claims, but that it was worth a considerable amount with these claims, and knowing these things and having acquired the knowledge as he did, it became Steinfeld's duty to bring this knowledge to the attention of the stockholders and directors of the Silver Bell Copper Company, and allow the company first to decline the purchase of the properties before he was free to act in opposition to the known interests of the company, as it can't be said at this time that the Silver Bell Copper Company would not have increased the limit of its indebtedness by amending its Articles of Incorporation, and then arrange to have borrowed the money or raised it in some manner to purchase these claims.

VI.

1114 The Court erred in deciding as a matter of fact that the closing down of the Old Boot Mine did not prevent the Silver Bell Copper Company from obtaining the English Group of mines, "or in any way change the relations of the corporation to the owners of the English Group as to hamper or impede the corporation in any plan or purpose it had in relation thereto," for the reason that the finding is misleading and is without any foundation in the evidence, as the evidence shows conclusively that the Old Boot Mine was shut down for the purpose of acquiring the English Group of mines for the Silver Bell Copper Company, and such was unquestionably the intention of the parties at the time, and so understood by J. N. Curtis, President of the Company, and L. Zeckendorf, one of its largest stockholders.

VII.

The Court erred in deciding as a matter of fact that "it is not apparent either in the findings or elsewhere in the record, that the closing down of the Old Boot Mine did as a matter of fact have any influence over the minds of the owners of the English Group to induce them to sell to Steinfeld, or had any influence over the price for which they sold," for the reason that the Old Boot Mine was shut down in order to acquire the English Group of Mines without the knowledge of their value reaching the owners, and in that way, by withholding from the owners of the English claims the information which would have enlightened them as to the real value 1115 of the claims, Steinfeld was unquestionably able to purchase the claims for much less than he would otherwise, and then again, it seems difficult to say with any degree of certainty, to what extent Steinfeld may have used the closing down of the Old Boot mine with the English Company as a leverage, toward the acquisition of the English claims for the least possible money.

VIII.

The Court erred in deciding that "it cannot be said as a matter of law that Steinfeld in purchasing the property for himself violated any duty he owed to the Silver Bell Copper Company," for the reason that the evidence shows clearly Steinfeld's domination over the directors and officers of the Silver Bell Copper Company at the time, and prior to the acquisition of the English claims; his acquiring knowledge of the value of the English claims by reason of his connection with the Silver Bell Copper Company, and his control over the affairs of the company and its officers and directors. The position in which he was at that time either to let the Silver Bell Copper Company acquire the property, or by a word prevent the company from acquiring the property as Steinfeld's individual needs required; the circumstances under which the property was acquired, and the fact that the President of the Silver Bell Copper Company, and Louis Zeckendorf, one of its largest stockholders,

believed at all times, and were led to believe by Albert Steinfeld, 1116 that the property was to be acquired for the Silver Bell Copper Company, all place Steinfeld in a position where he was not at liberty to acquire the property for himself when it was absolutely necessary for the company to own it in order to give any value to its property, and made of Steinfeld not only a constructive, but an express trustee for the company in the acquisition of the English claims.

IX.

The Court erred in deciding that "unless it shall appear that his, (Steinfeld's) promise to purchase for the company was made, or intended to be made to Zeckendorf as a stockholder of the Company, and through him to affect in some way the subsequent conduct and relation of the corporation to the property as by inducing the company to refrain from purchasing the property, or from making any effort thereto; that it was so intended, or did as a matter of fact

have any effect does not appear from anything in the record we have been able to discover," for the reason that under the circumstances of this case, considering Steinfeld's relations with the Silver Bell Copper Company, with J. N. Curtis, its President, with L. Zeckendorf, one of its largest stockholders, and with its directors, and considering Steinfeld's knowledge of the workings of the Old Boot mine, and its value with and without the English properties, and considering the belief as appears from the evidence in

1117 this case upon the part of J. N. Curtis, President of the Silver Bell Copper Company, and Louis Zeckendorf, one of its largest stockholders, that Steinfeld was at all times acting for the Silver Bell Copper Company in the acquisition of these properties, the burden is not upon the company, nor upon a stockholder in an action of this character to prove beyond the question of a doubt, that it was prevented from purchasing this property by the act of Steinfeld, and that it would have purchased the property but for the action of Steinfeld, but on the other hand, under all the circumstances and the conditions surrounding the parties at the time of the transaction, it is incumbent upon Steinfeld to show fair play upon his part and the performance of his duties and obligation to the company, by giving the company the first opportunity to acquire this property, and then in the event the company declined or neglected to take the property, then he might have acquired it for his own personal benefit.

X.

The Court erred in deciding that "unless the corporation parted with something, or lost, or was deprived of something of value by virtue of such promise, there was no fraud, and Steinfeld was in the relation of a mere volunteer free to carry out his expressed intent or not as he might thereafter choose," for the reason that Steinfeld's

1118 relations to the Silver Bell Copper Company were not that of a volunteer but were fiduciary, and his position was not such that he could mislead and deceive his *cestui que trust* into silence while he acquired property and reaped benefits at the expense, and to the detriment of the *cestui que trust*.

XI.

The Court erred in deciding that "as the option to take over the English Group given by Steinfeld had never been exercised by the company prior to May 20, 1904, and was only exercised then through said contracts, the rescission of the latter left the parties as though the contract had never been entered into. On the record, therefore, there was no acceptance of Steinfeld's proffer, and the Silver Bell Copper Company did not become an equitable or legal owner of the English Group under the option, and the trial court did not err in so holding," for the reason that the Silver Bell Copper Company was the equitable owner of the English properties at all times, the so-called option of July 15, 1901 being a mere fiction, given by Albert Steinfeld to the Silver Bell Copper Company over whose board of directors he had absolute control, and could have caused the ac-

ceptance if he chose, as he unquestionably caused the nonacceptance because he so chose, and for the further reason that the undisputed testimony shows conclusively that it was the intent and understanding of all the parties at the stockholders' meeting, at which 1119 the contract of May 20, 1904, was before them, that the purchase money for the Silver Bell properties, and notes received from the Imperial Copper Company, were the property of the Silver Bell Copper Company and they were so treated at that time by all parties.

XII.

The Court erred in deciding that "before Steinfeld should be required to pay back into the treasury of the company the money and note turned over to him, it should appear that he was either paid an undue amount or that no distribution of the proceeds of the sale should at the time, in fairness to the company, have been made. There is no showing that the amount paid Steinfeld under this resolution as his part of the proceeds of the sale, due to him as the owner of the English Group of mines, was in excess of what he should have been paid, nor was it shown that the distribution was prematurely made," for the reason that at the time Steinfeld was in complete control of the Board of Directors of the Silver Bell Copper Company; in a position to cause them to do his bidding, and every transaction passing through the hands of the Board of Directors of the Silver Bell Copper Company during that period of time must first have received the approval of Albert Steinfeld, and under these conditions this resolution was passed, distributing to Albert Steinfeld money that had been recognized by him as belonging to the Silver Bell Copper Company, as his share of the property 1120 sold, without ever having ascertained the value of the various properties. Such a distribution of the assets of the corporation, or even such a division of money between the parties, aside from the question of ownership, was arbitrary in the extreme, and under such circumstances the Court will not inquire into the fairness of the transaction until the parties have been first placed in statu quo, and the question of value fixed in some proper manner. As the Court has held, Steinfeld's relations towards the company were fiduciary and having dealt with the property of the cestui que trust in a matter detrimental to the interests of the cestui que trust, as is claimed, the burden of proof is not upon the cestui que trust to show damage or injury, but is upon the trustee to show the absolute fairness of the transaction.

XIII.

The Court erred in deciding that Albert Steinfeld was neither an express nor a constructive trustee for the Silver Bell Copper Company, for the reason that the testimony shows conclusively that he was both an express and constructive trustee for the Silver Bell Copper Company in the purchase of the English group of mines.

XIV.

The Court erred in not deciding that the Lower Court was in error in retaxing appellant's costs in the lower court, being the costs paid

by appellant in the Supreme Court on the reversal of this 1121 case upon a former appeal, for the reason that the Supreme Court has no power to tax nor award costs, but that all the costs abide the final determination of the suit, and appellant having obtained judgment in the lower court on the second trial of this case the judgment under the Revised Statutes of Arizona carried with it all the costs of the action, including the costs assessed against appellant in the Supreme Court on the reversal of the case.

A brief in support of the above grounds will be filed herein.

Respectfully submitted,

FRANK H. HEREFORD,

EDWIN F. MESERVE,

Attorneys for Appellant.

(Endorsed:) Filed April 3, 1909. F. A. Tritle, Jr., Clerk. Service of Motion for rehearing acknowledged.

And on to-wit: the thirtieth day of April, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

1122

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant be submitted.

And on to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day comes Mr. F. E. Curley, for Louis Zeckendorf, appellant herein, in open court, and gives notice of appeal to the 1123 Supreme Court of the United States from the judgment of this court, and

Upon motion of Mr. F. E. Curley, it is ordered that the appeal be, and the same is hereby, allowed, the amount of the cost bond fixed in the sum of One Thousand (\$1,000.) Dollars, and the Mandate stayed for thirty days.

And on the same day to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day comes Mr. Eugene S. Ives for Albert Steinfeld, et al., Appellants herein, in open court, and gives notice of a cross appeal to the Supreme Court of the United States from the judgment of this Court, and

Upon motion of Mr. Eugene S. Ives, it is ordered that the cross appeal be, and the same is hereby, allowed and the amount of the supersedeas bond be fixed in the sum of thirty thousand (\$30,000.) Dollars.

1124 And on to-wit: the twelfth day of May, 1909, came Albert Steinfeld, J. N. Curtis, R. K. Shelton and Silver Bell Copper Company, by their attorney and file in the clerk's office of said court in said entitled cause their certain Application and Motion for Appeal and Affidavit in words and figures following, to wit:

1125 In the Supreme Court, Territory of Arizona.

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

Application and Notice for Appeal.

The above-named appellants, Albert Steinfeld, J. N. Curtis, R. K. Shelton and Silver Bell Copper Company, conceiving themselves aggrieved by the final judgment entered on the 29th day of March, 1909, in the above entitled action and court against them, the said appellants, and in favor of said appellee, Louis Zeckendorf, do hereby appeal therefrom to the Supreme Court of the United States; said appellants hereby pray that their said appeal be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

EUGENE S. IVES, *Attorney.*

And now, to-wit, on the 12th day of May, 1909, the above application has been duly presented and considered, it is hereby or-

1126 dered that the appeal above prayed for be allowed, and the same is hereby allowed on filing a good and sufficient bond for costs in the sum of one thousand dollars.

EDWARD KENT,

*Chief Justice of the Supreme Court
of the Territory of Arizona.*

In the Supreme Court, Territory of Arizona.

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

TERRITORY OF ARIZONA,

County of Pima, ss:

Eugene S. Ives being duly sworn, deposes and says: that he is one of the attorneys for the appellants, Albert Steinfeld, J. N. Curtis, R. K. Shelton and Silver Bell Copper Company in the above entitled action; that this action was brought by the appellee to recover from the appellant Albert Steinfeld, the sum of Twenty thousand dollars (\$20,000.) with interest, the said sum being claimed to be due by the said appellants to the said appellee; that the matter in dispute, exclusive of costs, exceeds the sum of Five thousand dollars (\$5,000.), being as aforesaid, the sum of Twenty thousand dollars (\$20,000.) with interest.

1127 sand dollars (\$20,000.) with interest. EUGENE S. IVES,

Subscribed and sworn to before me this 1st day of May, 1909.
My commission expires May 9, 1911.

[SEAL.]

JOSIE B. HENDERSON,

Notary Public.

(Endorsed:) No. 1101. Supreme Court, Arizona. Albert Steinfeld, et al., Appellants, vs. Louis Zeckendorf, Appellee. Application and motion for appeal and affidavit. Filed May 12, 1909. F. A. Tritle, Jr., Clerk.

And on to-wit: the twelfth day of May, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:—

1128 In the Supreme Court of the Territory of Arizona.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY, a Corporation, and Mammoth Copper Company, a Corporation, Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

Appeal Bond.

Know all men by these presents, That we, Albert Steinfeld, J. N. Curtis, R. K. Shelton and Silver Bell Copper Company, a corporation as principals, and George Pusch and Fred Fleishman, as sureties, are held and firmly bound unto Louis Zeckendorf and the Silver Bell Copper Company, a corporation, in the sum of Thirty Thousand Dollars (\$30,000.) lawful money of the United States of America to be paid unto the said Louis Zeckendorf and the Silver Bell Copper Company, their heirs, executors, administrators, receivers, successors or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of May, 1909.

The condition of this obligation is such, that whereas, on the 20th day of March, 1909, a judgment was duly rendered and
1129 entered by the Supreme Court of the Territory of Arizona, in the action above entitled, wherein and whereby it was adjudged and decreed that a certain judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, therein appealed from, be in all things affirmed, which judgment of said District Court adjudged and decreed that the Silver Bell Copper Company, a corporation, recover from the said Albert Steinfeld the sum of Twenty thousand eight hundred and fifty Dollars (\$20,850.) with interest thereon, amounting in all, both principal and interest, at the date of said judgment of said District Court, to-wit, the 30th day of July, 1908, to the sum of Twenty six thousand Five hundred and fourteen and 25/100 Dollars (\$26,514.25), and adjudging further, among other things, that out of said sum there be paid to the said Louis Zeckendorf, as attorneys' fees, the sum of Two thousand six hundred and fifty-two and 50/100 Dollars (\$2652.50) and further adjudged that said Louis Zeckendorf recover from said Albert Steinfeld the costs of said action taxed at Six hundred and sixty-two and 60/100 Dollars (\$662.50), and

Whereas, the said Albert Steinfeld, R. K. Shelton and Silver Bell Copper Company, a corporation, have appealed to the Supreme Court of the United States from the said judgment of the Supreme Court of the Territory of Arizona, affirming the judgment of said District
1130 Court, and such appeal has been duly allowed by a Justice of the Supreme Court of the Territory of Arizona; and

Whereas, an order has been duly made and entered by

said Supreme Court of the Territory of Arizona, fixing the amount of the bond to be given upon such appeal, in order that such appeal may be a supersedeas and stay execution, at the sum of Thirty Thousand Dollars (\$30,000).

Now, therefore, if the said Albert Steinfeld, R. K. Shelton and Silver Bell Copper Company, a corporation, shall prosecute their said appeal to effect and, if they fail to make their plea good, shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and effect.

	J. N. CURTIS,	
	R. K. SHELTON,	
	ALBERT STEINFELD,	
	GEORGE PUSCH,	[SEAL.]
	FRED FLEISHMAN,	[SEAL.]
[SEAL.]	SILVER BELL COPPER COMPANY,	[SEAL.]
	By J. N. CURTIS, <i>President</i> .	

Attest:

R. K. SHELTON, *Secretary*.

TERRITORY OF ARIZONA,

County of Pima, ss:

George Pusch and Fred Fleishman, being duly sworn, doth, each for himself and not one for the other, depose and say; that he is one of the sureties named in the foregoing bond; that he is a resident and freeholder of the county of Pima and Territory of Arizona, and is worth the sum of Thirty Thousand Dollars (\$30,000.00) 1131 specified in the foregoing bond, over and above all his just debts and liabilities and exclusive of property exempt from execution.

GEORGE PUSCH,
FRED FLEISHMAN.

Subscribed and sworn to before me this 1st day of May, 1909.

[SEAL.]

JOSIE B. HENDERSON,
Notary Public in and for Pima County, Arizona.

My commission expires May 9, 1911.

Approved,

EDWARD KENT, *Chief Justice*.

(Endorsed:) No. 1101. Supreme Court, Arizona. Albert Steinfeld, et al., Appellants, vs. Louis Zeckendorf, Appellee. Bond Filed May 12, 1909. F. A. Tritle, Jr., Clerk.

And on to-wit: the fifteenth day of May, 1909, come Albert Steinfeld, et al., by their attorney and file in the clerk's office of said court in said entitled cause their certain Assignments of Error in words and figures following, to-wit:—

1132

In the Supreme Court of the United States.

ALBERT STEINFELD et al., Defendants-Appellants,

vs.

LOUIS ZECKENDORF, Plaintiff-Appellee.

Assignments of Errors.

The defendants-appellants hereby assign the follow--- errors committed by the supreme court of the Territory of Arizona:

I.

The Supreme Court erred in affirming the judgment of the district court in favor of plaintiff-appellee, upon the first cause of action in the complaint set forth, for the reason that upon the facts found by the court, defendants were entitled to judgment upon such cause of action.

II.

The Supreme Court erred in affirming the said judgment for the reason that the 300 shares of stock, the subject matter of the said cause of action, together with other property were, as alleged in the complaint, purchased for the sum of Two thousand dollars (\$2,000) in cash, and Ten thousand dollars (\$10,000) to be thereafter paid, for which sum of Ten thousand dollars

1133 (\$10,000) the appellant Steinfeld was personally obligated. The Two thousand dollars (\$2,000) so paid was the personal property of the said Steinfeld and was not loaned by him to the defendant-appellant, the Silver-Bell Copper Company, and the said Silver Bell Copper Company was at no time obligated to re-pay the same to the said Steinfeld, and declined to obligate itself to re-pay the same to the said Steinfeld and at no time agreed with said Steinfeld that it would pay said \$10,000 to the said Nielsen. Therefore, as between the said corporation and the said Steinfeld, the said Steinfeld, was primarily obligated to pay the said Ten thousand dollars (\$10,000) to Nielsen as the purchase price of the said stock, and the said stock was at all times the property of the said Steinfeld.

II.

The Supreme Court erred in affirming the said judgment for the reason that even if the said stock was held by Steinfeld as trustee for the said corporation, it was the duty of the said corporation and its officers to pay the dividend upon the said stock to the said Steinfeld, and the payment of the amount of the dividend to the said Steinfeld was not an act of corporate malfeasance, and is not collectible in this action.

III.

1134 The Supreme Court erred in affirming the said judgment appointing a receiver, for the reason that even if Steinfeld held the said stock as trustee, the payment of the said divi-

dend was, for the reasons set forth in the foregoing assignment, an act of corporate malfeasance, and therefore, there was no ground for the appointment of a receiver.

IV.

The Supreme Court erred in affirming the said judgment, for the reason that the facts found by the court are not sufficient to support a judgment founded upon the allegations of the complaint.

All of which is respectfully submitted.

Dated Tucson May 1st, 1909.

EUGENE S. IVES,

Attorney for Appellants.

(Endorsed:) No. 1101. Supreme Court, United States. Albert Steinfeld, et al., Appellants, vs. Louis Zeckendorf, Appellee. Assignments of error. Filed May 15, 1909. F. A. Tritle, Jr., Clerk.

1135 And on to-wit: the first day of June, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:—

In the Supreme Court of the Territory of Arizona.

LOUIS ZECKENDORF, Appellant,

vs.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY, a Corporation, and Mammoth Copper Company, a Corporation. Appellees.

Know all men by these presents, That I, Louis Zeckendorf as principal, and N. E. Plummer and Fred J. Steward as sureties, are held and firmly bound unto Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, and each of them, in the full and just sum of One Thousand (\$1,000.00) Dollars, to be paid to the said Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, their certain attorneys, executors, administrators, successors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

1136 Sealed with our seals and dated this 24th day of May in the year of our Lord, One thousand nine hundred and nine.

Whereas, lately in the Supreme Court of the Territory of Arizona, in a suit depending in said Court between Louis Zeckendorf, appellant, and Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, appellees, (being case No. 1101, as appears from the records of said Court), a final judgment was rendered against the said Louis Zeckendorf, and the said Louis Zeckendorf having obtained the allowance

of an appeal to the Supreme Court of the United States, and filed a copy thereof in the Clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation having issued directed to the said Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the 31 day of July 1909, next.

Now the condition of the above obligation is such that if the said Louis Zeckendorf shall prosecute his said appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

1137

LOUIS ZECKENDORF, [SEAL.]
N. E. PLUMER, [SEAL.]
FRED J. STEWARD, [SEAL.]

Signed, Sealed in the presence of

ELMER R. JENKINS,
CLARENCE W. WARNECROSS.

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

N. E. Plumer and Fred J. Steward, the persons whose names are subscribed to the above bond as sureties thereon depose and say each for himself and not one for the other, that he is a resident and freeholder in the County of Pima, Territory of Arizona, and is worth in his own right and name the sum of \$2,000.00 over and above all his just debts and liabilities, exclusive of property exempt from execution.

N. E. PLUMER,
FRED STEWARD.

Subscribed and sworn to before me this 28th day of May, A. D. 1909.

[SEAL.]

JAMES DUNSEATH,
Notary Public, Pima Co., Arizona Terr.

My Commission Expires Jan. 30th, 1911.

1138 Approved the within bond this first day of June A. D. 1909.

EDWARD KENT,
Chief Justice.

(Endorsed:) Filed June 1, 1909. E. A. Tritle, Jr., Clerk.

1139 And on to wit the twenty sixth day of July, 1909, come the Appellants-Appellees by their attorneys Messrs. Eugene S. Ives, Esq., and Francis J. Heney Esq., and file in the clerk's office

of said court, in said entitled cause, a certain Statement of Facts of the case by the Supreme Court of the Territory of Arizona in words and figures following to-wit:

In the Supreme Court of the Territory of Arizona.

LOUIS ZECKENDORF, Appellant.

vs.

ALBERT STEINFELD et al., Appellees.

ALBERT STEINFELD et al., Appellants.

vs.

LOUIS ZECKENDORF, Appellee.

Cross Appeals.

The Supreme Court of the Territory of Arizona hereby adopts as a statement of facts, in the case on appeal, in the nature of a special verdict, the following:

The facts as found by the District Court in and for the County of Pima as follows:

Findings of Fact.

(Title of Cause.)

This cause came on regularly for trial before the Court, 1140 Honorable John H. Campbell, Judge thereof presiding, sitting without a jury (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises the Court now finds the following facts in the case:

I.

That in the month of January, 1899, the Neilson Mining & Smelting Company, a corporation was duly and regularly organized under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County of Pima, said Territory; a true copy of its Articles of Incorporation and By-Laws appear in the evidence as exhibits, pages 515 and 622, Abstract of Record. That on the 14th day of January, 1901, the name of said corporation was regularly and duly changed to the Silver Bell Copper Company. That said Silver Bell Copper Company is the defendant in the above entitled action and that at all times herein men-

tioned it has been and is now a corporation, duly organized,
1141 existing and doing business under and by virtue of the laws
of the Territory of Arizona, with its principal place of business
in the City of Tucson, said Territory. That at all the times
mentioned in these findings subsequent to the 14th day of January
1901, Albert Steinfeld, J. N. Curtis and R. K. Shelton, have been and
now are the directors of said corporation, all of said parties being
residents of the City of Tucson, County of Pima, Territory of Arizona.

That plaintiff is now and for all the times herein mentioned has
been a resident of the City of New York, State of New York.

That the said defendant, the Mammoth Copper Company, is now
and for all of the times involved in this action has been a corpora-
tion, organized and existing under and by virtue of the laws of the
Territory of Arizona, having its principal place of business at
Tucson, Pima County, said Territory. That the defendant Albert
Steinfeld, is now and for all of the times mentioned or involved
herein, and ever since the organization of said corporation, has been
the owner in fact of all of the capital stock of said Mammoth Copper
Company and any stock standing in the name of any other party
was placed in his name in order to enable such party to qualify as a
director and was held by said party for that purpose alone, said stock
at all times in fact belonging to and being the property of said

Albert Steinfeld.

1142 That said Mammoth Copper Company at all times was but
an instrument in the hands of the said defendant Albert
Steinfeld, used by him for the purpose of transacting certain business
for himself that he did not care to transact in his own name; that
any money which may on its face have been paid to the defendant
Albert Steinfeld, and any property which may on its face have been
delivered to the said Albert Steinfeld for said Mammoth Copper Com-
pany, or for the benefit of the said Albert Steinfeld and the said
Mammoth Copper Company, in fact and in truth were paid and de-
livered to the said Albert Steinfeld as his own individual property
and were appropriated by him to his own individual use.

That all acts and things done in the name of the said Mammoth
Copper Company, and all things and property received given or
paid by or to or in the name of said Mammoth Copper Company,
were in fact but acts, things and property done, received given and
paid by and to and for the benefit of the said Albert Steinfeld.

II.

That the ownership of the stock of said Nielson Mining & Smelt-
ing Company, or the Silver Bell Copper Company, at all times was as
follows, viz: upon the organization of said Company, all the stock of
said Company was regularly issued to Carl Nielsen, in consideration
of the transfer by said Carl Nielsen, to said Company of his
1143 rights in the hereinafter mentioned Old Boot or Mammoth
mine, and of the transfer of certain personal property used
in working said mine; that immediately thereafter said stock was
divided as follows: 499 shares to and in the name of L. Zeckendorf
& Company; 30 shares in the name of Albert Steinfeld, Trustee,

being held by him in trust for and as the property of William and Julia Zeckendorf; 170 shares in the name of and belonging to J. N. Curtis; 300 shares in the name of and belonging to Carl Nielson, and 1 share in the name of R. K. Shelton, but belonging to, and the property of L. Zeckendorf and Company; that in January, 1901, the 300 shares of said stock standing in the name of Carl Nielson were transferred on the books of the Company to the name of Albert Steinfeld Trustee. That on the 6th day of June, 1903, the 499 shares standing in the name of L. Zeckendorf & Company were divided as follows: 250 shares thereof being issued to and in the name of L. Zeckenodrf, the plaintiff in this action; 249 shares being issued to and in the name of Albert Steinfeld, said Albert Steinfeld taking unto himself the ownership of the one share still standing in the name of R. K. Shelton, the certificate therefor at all times after being issued being in the possession of said Albert Steinfeld until December 9th, 1903 when, as hereinafter found, the same was given to said R. K. Shelton by the said Steinfeld, said R. K. Shel-
1144 ton then for the first time being put in possession of the certificate for said one share of stock; that the said R. K. Shelton never had any other or different interest in said Silver Bell Copper Company. That at all times and in all meetings of the stockholders of the said company said Albert Steinfeld voted all stock standing in his name as trustee or otherwise, and all stock standing in the name of L. Zeckendorf & Company; that L. Zeckendorf in person or by individual proxy never was at any stockholders' meeting of said company or voted any stock until the stockholders' meeting hereinafter mentioned, held on the 26th day of December, 1903. That at no time prior to June 6, 1903 was plaintiff a stockholder in the Nielsen Mining & Smelting Company, or the Silver Bell Copper Company in his own right, but at all the times hereinbefore mentioned the stock issued to L. Zeckendorf & Company stood in the name of and was the property of the copartnership of L. Zeckendorf & Company, and was voted and controlled by Albert Steinfeld as the managing partner of said copartnership and the said L. Zeckendorf & Company had full and complete knowledge, through Albert Steinfeld, its managing partner, of all of the acts and things heretofore and hereafter found as having been done and performed prior to the 6th day of June, 1903.

III.

1145 That defendant R. K. Shelton at all of the times involved in this action and ever since the incorporation of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, has been and is now but the representative of the said Albert Steinfeld on the Board of Directors of said Company, and at all times involved in this action voted as ordered, directed and requested by said Albert Steinfeld and not otherwise. That as Secretary of said corporation said R. K. Shelton at all times did as ordered, directed and requested by said Albert Steinfeld. That for all the times subsequent to June 6th, 1903 said J. N. Curtis as a director and other officer of the said Silver Bell Copper Company

was under the complete dominion and control of said Albert Steinfeld and as such director or other officer did whatsoever said Steinfeld requested or directed. At no time and under no circumstances subsequent to June 6th, 1903 did the said J. N. Curtis as director or other officer of the said corporation, do any act, take any step or cast any vote except as requested or directed by the said Albert Steinfeld. That Albert Steinfeld at all of the times involved in this action and mentioned in these findings was in fact in complete control of Nielsen Mining & Smelting Company and of said Silver Bell Copper Company, and in absolute control and direction of its business, property and affairs.

That the power of Albert Steinfeld over the Silver Bell
1146 Copper Company, and over the directors and officers thereof up to the month of June, 1903, arose out of the following facts and conditions, viz: the fact that said Company was heavily indebted to L. Zeckendorf & Company, and that L. Zeckendorf & Company and William and Julia Zeckendorf held a majority of the stock of said company, said Albert Steinfeld as the managing partner of said L. Zeckendorf & Company having the power to control said indebtedness and to vote said stock of said L. Zeckendorf & Company and as trustee of William and Julia Zeckendorf having the power to vote said stock of William and Julia Zeckendorf, and the fact that after January 14, 1901, as trustee of the Silver Bell Copper Company in the ownership of the 300 shares of stock purchased from the Neilsens, he assumed and was accorded by Curtis and Shelton the right and power of voting and did vote that stock.

IV.

That because of the facts herein found, it at all times would have been an idle and useless act for the plaintiff to make any demand whatsoever on the said Silver Bell Copper Company or on its Board of Directors or any of them to bring any action against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton, particularly any action for the recovery of any property of said corporation, or any property claimed to belong to said corporation, or for
the payment to said corporation of any debt owing by said
1147 parties or either of them, and particularly any action against the said Albert Steinfeld in favor of said corporation to recover any property or to redress any wrong done to said corporation by him, and for said reasons it would have been a useless and idle act for the plaintiff to have demanded of said Board of Directors that this action be brought by the said corporation against the said J. N. Curtis, R. K. Shelton and Albert Steinfeld, and if any such action has been brought by said corporation it would not have been prosecuted in good faith nor for a full recovery thereon, nor for the benefit of said corporation or this plaintiff as a stockholder thereof; and for such reasons and because of such facts and because it would have been an idle and purposeless act so to do, plaintiff made no demand whatsoever on said corporation or on the Board of Directors thereof, that it bring this or any action against said defendants or that it prosecute the same, and plaintiff in bringing and

prosecuting this action brought and prosecuted the same as a stockholder of said defendant Silver Bell Copper Company for its use and benefit and in order that its property illegally taken from it, as herein found, might be recovered and restored to its assets.

V.

That ever since the year 1878 this plaintiff and defendant Albert Steinfeld were partners, doing business in the City of Tucson, under the name of L. Zeckendorf & Company, under the terms and conditions of the articles of partnership and amendments thereto existing between them, which are in evidence and marked exhibits —

Zeckendorf made visits from time to time to Tucson and upon such visits inspected the business of the copartnership and shared and directed in its conduct, and such was the condition at all times up to and including the commencement of this action; that plaintiff, at all said times, was a resident of the City of New York, State of New York, and said Albert Steinfeld was a resident of the City of Tucson, County of Pima, Territory of Arizona, and that during all of said times said Albert Steinfeld was the General Manager of the said business of L. Zeckendorf & Company and as such was in actual and active control of its business and its business affairs in said Territory, and employed and discharged all of its help and gave and extended all credits and determined its business policy in all matters and things in said Territory of Arizona and in connection with its business therein. That plaintiff attended to and managed the business of said firm in New York, particularly the purchasing of the goods and merchandise handled by said firm.

That for some time prior to the 14th day of January, 1899, William and Julia Zeckendorf were the owners of what is known as the Mammoth, or the Old Boot Mine, being one of the mines hereinafter listed and mentioned; that the legal title to said mine stood in the name of Albert Steinfeld, he holding the same as trustee for said William and Julia Zeckendorf. That for some time prior to said 14th day of January, 1899, one Carl Nielsen had a working contract on said mine, executed by said Albert Steinfeld as the ostensible owner thereof, but for the real use and benefit of said William and Julia Zeckendorf, under and by virtue of which said Nielsen was to have the right to operate said mine and to take the ores therefrom and to pay to said Steinfeld, for the use and benefit of said William and Julia Zeckendorf, certain royalties on all ore extracted from said mine. That during the operation of said mine, said Albert Steinfeld, as the manager of said L. Zeckendorf & Company, and in actual control of the business of said partnership, advanced and extended to said Carl Nielsen certain credits, and sold to him on credit large amounts of merchandise, resulting in said Carl Nielsen on and prior to the 14th day of January, 1899, becoming indebted to said L. Zeckendorf and Company in a large sum of money.

That defendant J. N. Curtis, during the time herein last above mentioned, was in the employ of L. Zeckendorf & Company, and in

charge of its mines and mining properties, and at all said times took active personal charge of its mines and mining properties and attended to the direction of same and to the sales thereof; and 1150 received as his compensation for such work certain pay for his time and certain commissions on sales of mines that might be made by him, or through or under his influence or by his help and assistance.

That on or about the 14th day of January, 1899, in order to protect said indebtedness so owing to said L. Zeckendorf & Company by said Carl Nielsen, said Albert Steinfeld caused the Nielsen Mining & Smelting Company to be incorporated, under the laws of the Territory of Arizona. That thereafter William and Julia Zeckendorf, through the said Albert Steinfeld as trustee, gave an option to said Nielsen Mining & Smelting Company on the said Mammoth or Old Boot Mine, for an agreed price of twenty-five thousand (\$25,000) dollars, to be paid to said William and Julia Zeckendorf in installments of twenty-five hundred (\$2,500) dollars each, to be paid each three months; said Carl Nielsen had previously thereto transferred to said Nielsen Mining & Smelting Company his working contract on said mine above mentioned and also transferred all personal property used on and in connection with said mine and the operation thereof, and said Nielsen Mining & Smelting Company assumed said indebtedness owing to said L. Zeckendorf & Company by said Nielsen, and the same was then charged on the books of said L. Zeckendorf & Company by and on the order and under the direction of said Albert Steinfeld, to the said Nielsen Mining 1151 & Smelting Company, and the same was thereafter carried on the books of L. Zeckendorf & Company in the name of Nielsen Mining & Smelting Company (until its name was changed to the Silver Bell Copper Company, and thereafter in such name), and at the same time L. Zeckendorf & Company released said Carl Nielsen from all personal obligation on said indebtedness; that thereupon the stock of the said Nielsen Mining & Smelting Company was divided as heretofore found, the 170 shares which were given to said J. N. Curtis were given to him by L. Zeckendorf & Company as compensation for his services in connection with said transfer and services to be performed by him for said Silver Bell Copper Company. That the directors of said company thereupon elected were said J. N. Curtis, Carl Nielsen and R. K. Shelton; that said Carl Nielsen was elected the nominal general manager and superintendent and J. N. Curtis the president and said R. K. Shelton the secretary of said Company; but at all times thereafter, prior to June 6th, 1903, said Albert Steinfeld, as managing partner of L. Zeckendorf & Company, assumed to be the general manager of said company and assumed the power of directing its affairs and of controlling all of its actions, and said assumption of power on the part of the said Albert Steinfeld was assented to and acknowledged by the said J. N. Curtis, Carl Nielsen and R. K. Shelton, and L. Zeckendorf, 1152 That all matte, bullion and other mineral products obtained from the said mines, which were shipped or sold, were shipped or sold through the firm of L. Zeckendorf & Company and the pro-

ceeds thereof received by said firm and credited by it upon the indebtedness to it of said corporation.

VI.

That said Nielsen Mining & Smelting Company, upon said transfers by Nielsen to it being complete and in January, 1899, entered upon the work of the development of said Mammoth or Old Boot mine, said Carl Nielsen, as superintendent, being in actual charge thereof. That under said operation, large bodies of ore in said mine were developed and were found to extend to within such a distance of the southern boundary line thereof, being the dividing line between said mine and the Prospector Mine, one of the mines belonging to the English group of mines hereinafter referred to, that it became evident that said ore bodies then developed underneath the ground in said Mammoth mine ran into said Prospector Mine, and other of said English group of mines, the said facts being ascertainable alone from an examination and inspection of the underground workings of said Mammoth or Old Boot Mine.

That in the year 1900 the said J. N. Curtis on the order and direction of said Albert Steinfeld took up in his own name other mines about and adjoining said Old Boot Mine, all for the use and benefit of said Nielsen Mining & Smelting Company, or Silver Bell

1153 Copper Company, and the same were carried by said J. N. Curtis thereafter in his own name, but as the property of and for the use and benefit of said Silver Bell Copper Company, said mines being included in the list of mines sold to the Imperial Copper Company as hereinafter found.

VII.

That during all the times herein mentioned those mines known as the English group of mines, being a part of the mines described in Finding XXII and especially so listed therein, surrounded said properties of the Silver Bell Copper Company. That the beneficial ownership of said mines was in certain parties resident in England, from which fact the said mines came to be known as the English group of mines. That one Francis and one Volkert claiming that said mines were open to location, had filed locations on the same and were claiming title thereto; that this condition of ownership by said parties continued through the year 1899 and through the year 1900, up to the time of the purchase by Albert Steinfeld, hereinafter mentioned, of what is known as Francis & Volkert titles and the English title thereto. That the Francis & Volkert claims to said mines were initiated on or about the 1st day of January, 1900. That said Mammoth or Old Boot Mine, during the fall of the year 1899 and up to the time of the closing of said mine in the spring of 1154 1900, was being worked at a substantial profit. That at said time said Nielsen Mining & Smelting Company was indebted to said firm of L. Zeckendorf & Company in an amount approximating thirty thousand dollars (\$30,000.00) over and above the value of all matte and bullion then on hand or in transit, for moneys

which had been advanced by said L. Zeckendorf & Company to said Nielsen Mining & Smelting Company, to enable it to develop and open up said mine and to buy machinery, mills and other property necessary for the working of said mine and the handling of ores taken therefrom, and also for certain goods, wares and merchandise sold by said L. Zeckendorf & Company to said Nielsen Mining & Smelting Company.

VIII.

That in the fall of 1899, said J. N. Curtis, the then president of said Nielsen Mining & Smelting Company, advised and informed said Albert Steinfeld that the developments of said Mammoth Mine showed that the ore bodies therein, (the same being underground and undeveloped and, except as thus shown, unknown) would run into said Prospector Mine and other mines belonging to said English group of mines, and that said underground workings of said Mammoth Mine showed that there were probably great values in said English group of mines. That at about the same time said Albert Steinfeld became dissatisfied with the management of said Carl Nielsen and with his work as superintendent and general
1155 manager of said mine; and thereupon and in the month of

December, 1899, said Albert Steinfeld, without action of or authority from the board of directors of said company, assumed to and did discharge said Carl Nielsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the board of directors of said company; and at the same time ordered said Mammoth Mine to be closed down and all work therein to be stopped, as soon as the coke and ore on hand should be used up. His controlling purpose in so doing being to obtain from Nielsen for the corporation the ownership of the said 300 shares of stock then owned and held by him, and in order that the English group of mines, so-called, and the Francis-Volkert titles thereto might be purchased at a nominal or small sum, without the owners thereof obtaining knowledge through the workings of said Mammoth Mine and the showing of ore bodies therein, that said ore bodies probably did and would extend into said English group of mines; and said mine was not shut down because said mine could not have been worked at a profit, for the same could have been worked at a substantial profit; and that all of the said acts and purposes of said Steinfeld were communicated by him to the said L. Zeckendorf at the time the said acts were done or the said purposes formed.

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IX.

That said J. N. Curtis as the President of said Nielsen Mining & Smelting Company, prior to said time, had frequently advised and notified said Albert Steinfeld, and said Albert Steinfeld at all times had known, and said Zeckendorf had been told and informed by said Steinfeld that it was very desirable that said English group of mines, so-called, should be purchased, in order that all of the mines and mining claims surrounding said Mammoth Mine should with it constitute one group, and in order that the whole thereof might

be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth Mine, soon ascertain that the ore bodies therein probably extended into said English group of mines; and because of the fact that all purchasers of large mining properties desire to control all claims immediately surrounding any developed mine or mines.

That said Albert Steinfeld, before ordering said mine to be closed, and work thereon to be stopped, visited said mine and examined the same, and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in said mines and their tendencies, as above found and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Finding XXII could or might be sold as one group and one property. That said

1157 Albert Steinfeld acquired said information because of the fact that he was acknowledged and conceded to be the actual manager of said Nielsen Mining & Smelting Company, and because of his assumption of such power and of such position, and that he acquired said knowledge and information solely from said J. N. Curtis, the President of the Nielsen Mining & Smelting Company, and from a personal examination of said mine made by him as such assumed and acknowledged actual manager of said company. That said Nielsen being discharged as said superintendent and manager, the personal control of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the President of said Nielsen Mining & Smelting Company.

X.

That under date of the 16th day of May, 1900, said Steinfeld entered into an agreement in writing with the said Francis and Volkert, said agreement being hereafter set out in full in Finding XVII attached to and as a part of the July 15, 1901, proposal or option. (Ex. 137.)

That thereafter and in pursuance of said agreement the interest of said infant children was conveyed to said Mammoth Copper Company for said Steinfeld, and he paid the said sum of \$625 therefor; and the said sums of \$1,875 and \$625 so paid by said Steinfeld, were the personal money of said Steinfeld.

1158

XI.

That on or about the 29th day of June, 1900, said Albert Steinfeld purchased from the said Carl Nielsen the said three hundred (300) shares of stock belonging to said Carl Nielsen, and purchased from said Carl Nielsen and one Lewis two certain mines they had and all mines and mining claims that said Carl Nielsen might have in the mining district in which were located said Mammoth, or Old Boot Mine, said mining district being known as the Silver Bell Mining District. That the purchase price paid and agreed to be paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2,000) dollars cash then paid, and the sum of ten thousand (\$10,000)

dollars, agreed to be paid out of the proceeds of the working of said Old Boot or Mammoth Mine, or the proceeds of the sale of said mine, in the event the same should be sold before said sum should be paid out of the proceeds derived from the working of said mine; That said contract, on the direction of the said Albert Steinfeld, was signed by himself individually and by said Nielsen Mining & Smelting Company. That said sum of ten thousand (\$10,000.00) dollars on January 24, 1904, was paid by said Steinfeld, to Mary Nielsen, the successor of Carl Nielsen, and one of the parties to said contract; That said Albert Steinfeld took said 300 shares of 1159 stock in his name as "trustee" and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company said Silver Bell Copper Company during all such times and now being the equitable and real owner thereof.

XII.

That said Albert Steinfeld, after closing down said mine and after purchasing said Nielsen stock and interests and mines and said Francis and Volkert interests, proceeded in September, 1900, to England and there concluded the purchase of the English titles to said English group of mines, including the purchase of the equitable, as well as the legal, title, thereto, paying therefor the sum of five thousand (\$5,000.00) dollars. That said sum of \$5,000 (five thousand --) so paid for said English group of mines, and said sum of twenty-five hundred (\$2,500.00) dollars paid to said Francis and Volkert, were amounts very much less than said mines could probably have been purchased for, if the owners of said English titles to said group of mines and said Francis and Volkert titles thereto, or either, had become possessed of the knowledge which said Albert Steinfeld had acquired, as hereinabove found, of the tendency of the ore bodies in said Mammoth or Old Boot Mine.

XIII.

The said Steinfeld in purchasing the said English group 1160 of mines from the said Francis and Volkert and from the said English owners did not purchase the same with the then intent that thereby they should become and be the properties of the Silver Bell Copper Company but at the times of the said purchases the said Steinfeld intended to take the properties as his own, but with purpose to offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would be and had been put to in acquiring the same, and said Steinfeld expected that the said Silver Bell Copper Company would take over the said properties, the said Steinfeld intending on his part that in the event the said corporation did not take over the said properties and so reimburse him he would keep said properties for and as his own.

XIV.

That after acquiring said Francis and Volkert titles to said mines, and prior to his going to Europe, said Albert Steinfeld directed that the said Mammoth or Old Mine be again put in operation and again worked, and thereupon and thereafter it and the adjoining mines as one property were worked and operated by said Silver Bell Copper Company. That by the time said mine was reopened the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot Mine and adjoining mines were very much less than at the time said Old Boot mine was closed down by Steinfeld in the spring of 1900 as above found.

That in January, 1900, said Steinfeld caused the development work upon said mine to be stopped; the smelter, however, was run until some time in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and substantially all the ore which had been developed prior thereto, were exhausted, and that if said development had not been stopped by said Steinfeld but had been continued during the operation of said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied, and in consequence thereof said Silver Bell Copper Company sustained great damage.

XV.

That in the early part of 1901, the question as to the ownership of the 300 shares of stock purchased from Nielsen by Steinfeld and of the English group of mines arose between Steinfeld and Curtis as president of the Silver Bell Copper Company, Steinfeld claiming the absolute ownership of both the shares of stock and of the mines, and Curtis claiming that Steinfeld held the same in trust for the company. Curtis thereupon consulted S. M. Franklin, the company's attorney, and was advised by Franklin that Steinfeld held both the stock and the mines as the trustee for the corporation, and Steinfeld was so advised. That upon receiving this advice 1162 Steinfeld demanded of Curtis that interest be paid to him by the company on the sums of money expended by him in the purchase of stock and of the mines, as is evidenced by a letter written by said Steinfeld to Curtis, dated May 19, 1901. Curtis, as the treasurer of the company, signed checks for such interest and sent them to Steinfeld. After the receipt of such checks by Steinfeld he consulted with said Franklin as to his rights; he was advised by Franklin that because of his relations with the company, he had no legal right to make the purchases for his own benefit; but, on the other hand had no right to compel the company to assume such purchases; that it was his duty to give to the company an opportunity at a meeting of the stockholders at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares within a reasonable time to reimburse him for his outlays, and to take over the property if he so desired; and that if the company should not avail itself of his offer, Steinfeld could then hold the properties as his own. After

receiving said advice Steinfeld returned the checks for the interest to Curtis.

XVI.

That in the year 1900, immediately upon acquiring said two mines from said Nielsen and Lewis and the said English group of mines, said Steinfeld, as the same were acquired, turned same over to the possession of the said Nielsen Mining & Smelting Company, and said Nielsen Mining and Smelting Company thereupon assumed the possession and control thereof.

That said J. N. Curtis, as president of said Silver Bell Copper Company, upon and after said mines were turned over as aforesaid to said Silver Bell Copper Company from time to time prepared various maps for and under the direction of said Albert Steinfeld, showing all of said mines named in Finding XXII as one property and one entire group of mines, and as the mines and properties of said Silver Bell Copper Company; and said J. N. Curtis, as president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, from time to time prepared various reports of "all of the properties of said Silver Bell Copper Company" and included in said reports all mines mentioned in Finding XVII without in any manner segregating or separating the same into groups, and as being properties of said Silver Bell Copper Company.

XVII.

That under date of July 15th, 1901, in order to bring the matter of the purchase of the properties hereinbefore referred to formally before the stockholders of the company for action, said Albert Steinfeld delivered to the secretary of said Silver Bell Copper Company a document or proposal dated of said date in the words and figures following, viz:

1164

"TUCSON, ARIZ., *July 15th, 1901.*

"Silver Bell Copper Company (Formerly Nielsen Mining and Smelting Company), Tucson, Arizona.

GENTLEMEN: On May 16th, 1900, I entered into a contract with Margaret Francis and Julius Volkert in regard to certain mining claims and mill sites situated in the Silver Bell Mining district, Pima County, Arizona, claimed by them and which are situated either adjoining or near to the Mammoth mine, or better known as the Old Boot mine, which is being operated by your company, a copy of which agreement is hereto annexed.

In pursuance of this contract I have caused to be conveyed to the Mammoth Copper Company, the corporation mentioned in the agreement, all the interest of the said Margaret Francis and Julius Volkert as well as the interest of the minor heirs of John Francis, deceased, and in consideration therefor, I have received the following, to-wit:

1. Nine hundred and ninety-seven shares of the full paid up and non-assessable stock of the said Mammoth Copper Company, being all the shares of the capital stock of that corporation, except the three shares held by its directors.

1165 2. The promissory note of said corporation, dated June 8th, 1900, payable to my order one year from date for the sum of \$2,780, with interest thereon from its date until paid at one per cent per month.

3. The promissory note of said corporation, dated June 8th, 1900, payable to my order or demand, for \$12,500 with interest from demand at the rate of one per cent per month.

4. A mortgage executed by said corporation on all said mining claims and mill sites, as security for the payment of said two promissory notes.

5. The written agreement of said corporation, dated June 8th, 1900, wherein it agrees to do and perform all the matters and things by me agreed to be done and performed in the said contract of date May 16th, 1900, a copy of which agreement of date June 8th, 1900, is hereto annexed.

The first mentioned promissory note being for the payment of the sum of \$2,780.00, represents the actual amount of money paid by me to Margaret Francis, individually and as guardian for her children, and to Julius Volkert for their deeds to the mining claims and mill sites mentioned in their agreement, to-wit: \$2,500.00 for the deeds and \$280 or thereabouts for legal and other expenses in connection therewith.

The other promissory note being for \$12,500, is held by 1166 me as security for the payment of said Mammoth Copper

Company of the sum of \$12,500 provided to be paid to said Francis and Volkert when said mines are sold in accordance with the agreement of May 16, 1900, and as security for the faithful performance on the part of said company of their agreement to me of date June 8th, 1900.

I herewith submit for your inspection the originals of said agreements, notes, mortgages and deeds.

2.

Certain mining claims mentioned in the agreement of May 16, 1900, were claimed under different locations by the other claimants, and by the terms of that agreement I was obligated either to acquire such adverse locations and claims by purchase, or to litigate the same.

In order to fulfill the obligations imposed upon me in this regard, it became necessary for me to go to England to see some of the adverse claimants. This I did in the summer of 1900. After considerable negotiations I obtained the deed on the English claimants, Frederick Clark Beckwith, and the Tucson Mining and Smelting Company, Limited, a British corporation, and also of Herbert B. Tenny of Tucson, which deed was dated August 21st, 1900, and conveyed to me the following mining claims situate in said Silver Bell Mining district, to-wit: Page, Southern Beauty, Silver Bell, Confidence, Union, Emerald, Comet, Prospector, Florence, Imperial and Yankee.

1167 The amount of costs and expenses by me in the negotiation and in acquiring said deed was as follows:

Purchase price, \$5,815.63.

The expense of trip, attorney's fees and incidentals, \$2,668.51, all of which sums were expended by me on or about August 21st, 1900.

I now hold in my own name all the mining claims so conveyed to me by such deed.

3.

On June 29th, 1900, I obtained from Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis, their deed conveying to me the Clarence mining claim, situate in said Silver Bell mining district, and also, "all their right, title and interest in and to all mining claims, mill sites and property situate in said Silver Bell mining district, the legal or equitable or record title to which is now in either the Nielsen Mining and Smelting Company, a corporation or in the Mammoth Copper Company, a corporation, or in the Tucson Mining and Smelting Company, a corporation, or in Frederick Clark Beckwith, or in Julius Volkert or John Francis, or in the heirs, distributees or estate of said John Francis, deceased, or in J. N. Curtis, or in Herbert B. Tenny, or in said Albert Steinfeld." This deed is of record in the office of the county recorder of Pima County, in Book 22, of Deeds to Mines, on pages 508 and 509, reference to which is hereby made.

For this deed I paid to the grantors on the 3rd day of 1168 July, 1900, the sum of \$2,000 and I now hold in my own name, all the mining claims so conveyed to me.

In this connection, I will further state that on June 29th, 1900, the Nielsen Mining and Smelting Company, by J. N. Curtis, its president, and myself, as parties of the first part, and Mary Nielsen and Carl Nielsen as parties of the second part, entered into an agreement, the original of which is in possession of yourselves. At the time of the execution of this agreement I personally paid to said Niensens out of my own money, the sum of \$2,000, which was in payment of the quit-claim deed executed to me by them and Lewis, above referred to; and it was at the same time agreed by Mr. J. N. Curtis, your president and myself, that the three hundred shares of stock assigned to me by the Niensens should be held by me in trust until the purchase price thereof, to-wit: Ten thousand dollars was paid by the Nielsen Mining & Smelting Company, as per the agreement, when said shares should be assigned by me to your company.

4.

I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same, and as an inducement to you to purchase and acquire the same, I am willing to place you in 1169 my shoes, that is to say, to sell and convey to you all the interest so acquired by me, upon my being repaid the amounts of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me the performance on your part, of all the matters and things and payments which under the various contracts I am liable or responsible for. To this end I herewith submit to you the following proposition:

Proposition.

If you will repay to me, on or before the 15th day of October, 1901, the sums of money I have expended and expenses incurred, as above set forth, with interest thereon from the dates of such respective expenditures up to the 15th day of October, 1901, at the rate of 1 per cent per month, and aggregating the total sum of fifteen thousand, one hundred and ninety-two dollars and forty-five cents, being the aggregate of the following items, to-wit:

June 8th, 1900, paid Francis and Volkert and expenses, \$2,780.00.

Interest on above, \$151.75; total, \$3,231.75.

August 21, 1900, paid for deed Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney, and expenses, trip to Europe to obtain same, and other expenses connected therewith, \$8,484.14.

1170 Interest on same to October 15th, \$1,166.56. June 29, 1900, paid to the Nielsens and Lewis for their deed, and expenses connected therewith, \$2,000.

Interest on same to October 15th, \$310; total, \$15,192.45 and if you will on or before the said 15th day of October, 1900, and at the same time that the said repayment is made to me, duly agree in writing to do and perform the annual assessment work required to be done on all mining claims, and pay or repay for the annual assessment work required to be done thereon for the years 1900 and 1901, and further agree to assume and perform all the matters and things agreed to be done by me, or assumed by me in my said agreement with said Margaret Francis and Julius Volkert of date May 16, 1900, and further save and keep me harmless from any loss or expense by reason of my having entered into said agreement;

Then I will agree as follows:

First. Immediately to cancel as paid said note for \$2,780, executed to me by said Mammoth Copper Company, and thus extinguish said obligation.

Second. To hold all of said 997 shares of the capital stock of said Mammoth Copper Company, and to hold the \$12,500 promissory note and mortgage executed by said company, and to hold all the mining claims and mill sites conveyed to me by said Frederick Clark

Beckwith, Tucson Mining and Smelting Company, Limited, 1171 and Herbert B. Tenney, by their deed dated August 21, 1900; and the mining claims and the mill sites conveyed to me by said Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis; and to hold the 300 shares of the capital stock of the Nielsen Mining & Smelting Company (now the Silver Bell Copper Company) as trustee for your company, subject to the following trusts and conditions, to-wit:

1. That upon your complying and performing the matters and things by you agreed to be done and performed according to the terms of the written agreement which hereinabove is provided you shall execute to me, that is to say, upon your doing all the matters

and things by me agreed to be done and performed under my agreement with said Francis and Volkert of date May 16th, 1900, and upon your paying to them or their assigns the sum of \$12,500 as in said agreement is provided, or procuring their release from said payment; and also paying to said Carl Nielsen and Mary Nielsen, his, her or their assigns, or personal representatives, the sum of ten thousand dollars as agreed to be done by our joint agreement with them of date June 29th, 1900; then and in such event I will transfer and assign to you absolutely all of said shares of stock, both said 997 shares of stock of the Mammoth Copper Company and the 300 shares of the Nielsen Mining and Smelting Company; and I will cancel their promissory note for \$12,500 and satisfy on record the said mortgage given as security therefor; and I will convey to you absolutely all the right, title and interest acquired by me under the ~~said~~ deeds executed to me by said Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney and under the deed executed to me by Mary Nielsen, Carl Nielsen and L. B. Lewis.

2. That in the event you fail to carry out your said agreement with me to do and pay for the annual assessment work upon said mining claims, or to make either said payment of \$12,500 or said payment of \$10,000, respectively, as above provided or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute to me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay me, as aforesaid, and I am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims, and mill sites described in said deed to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatsoever, equitable or otherwise, thereto or therein.

I hereby give you until the 15th day of October 1901, to accept this proposition and to pay me the said sum of \$15,192.45 to me, and to execute the written agreement above provided for; it being distinctly understood that if you fail to pay me said sum of \$15,192.45 and execute said agreement to me on or before said 15th day of October, 1901, then this proposition and option to you is ended and in that event I shall hold all said shares of stock in the Mammoth Copper Company, and all said mining claims aforesaid, individually and for my own benefit. The 300 shares of stock in the Nielsen Mining and Smelting Company (now the Silver Bell Copper Company), however, I will in any event continue to hold under our joint agreement with the Niensens in regard thereto, unless you wish to disaffirm the said agreement as made by your president in regard thereto.

Yours truly,

ALBERT STEINFELD."

That attached and made a part of said document were the following contracts, viz. The contract known as the Nielsen agreement and described in the evidence herein and set out in full being Exhibit No. 44. And the contract contained in the evidence herein

and known as the Francis and Volkert agreement, attached to and being the latter part of Exhibit No. 137.

That said document had been prepared by S. M. Franklin, the attorney for said Silver Bell Copper Company, for the purpose of bringing the question of said Steinfeld's actions in purchasing said mines and properties before the stockholders of said company; but in making and in presenting the said proposition the said
1174 Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duties to the said company.

That said document was presented to the Board of Directors of said company on the 15th day of July, 1901, at which the said proposition was ordered filed; and at which meeting it was resolved that a meeting of the stockholders should be called to decide whether said proposition should be accepted or rejected. That no such meeting, as above found, was called or held.

That on October 1, 1901, a meeting of the directors of said company, namely, Steinfeld, Shelton and Curtis, was held, at which the following took place:

"Mr. Albert Steinfeld stated he would agree, in consideration of this company performing and paying for the assessment work done and to be done, for the years 1900, 1901, and 1902, upon all of the mining claims mentioned and described in his communication to this company of date July 15th, 1901, to extend the time within which this company has the right to accept his said proposition and to pay the amounts of money required by it to be paid if the proposition is accepted, from October 15th, 1901, the date mentioned in said communication, until the 15th day of September, 1902; provided, however, that upon said 15th day of September, 1902, this company not only pay to him the amount of money called for in said communication, to-wit: \$15,192.45, but also to pay him the interest from October 15th, 1901, until the 15th day of Sep-
1175 tember, 1902, at the same rate as is set forth in said communication.

On motion duly seconded it was unanimously resolved that the foregoing proposition of Mr. Steinfeld be accepted and that the president of this company be and he is hereby authorized to do, perform and pay for the annual assessment work for the years 1900, 1901, and 1902, upon the mining claims mentioned in the communication of Mr. Albert Steinfeld of date July 15th, 1901, and further

Resolved, That the meeting of stockholders authorized and directed by the resolution of this board heretofore adopted, to be called by the president for the purpose of considering the proposition of Mr. Steinfeld on date of July 15th, 1901, be called by him on a day not later than the 15th day of September, 1902."

That a stockholders' meeting was thereafter held on said October 1st, 1901, L. Zeckendorf was not then in Tucson. No action whatever with reference to said proposition was taken and no such meeting as that so ordered to be called was ever called or held. That the matter of the acceptance or rejection of said offer did not again

come before either the director or stockholders of said company and no corporate action was taken thereon until the meeting of the directors held under date of May 20th, 1903, hereinafter found and set out. That at all times after July 15th, 1901, the Silver Bell Copper Company continued, as it had since November, 1900, 1176 to possess, work and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company.

XVIII.

That neither said Albert Steinfeld nor said Mammoth Copper Company at any time after July 15, 1901, made or asserted any claim to or right in any of said mines or property, except such as are recited in the minutes of the meetings of the directors of the Silver Bell Copper Company.

That plaintiff knew nothing of said proposal or of the facts concerning the purchase of said mines, properties or stock, and of the prices paid therefor, or of the circumstances surrounding the same until long after May 20th, 1903, except that plaintiff knew that said Steinfeld had, during the year 1899, and the early part of the year 1900 reported to plaintiff that the purchase of the same was desirable and should be accomplished and that said Steinfeld intended for the company to acquire the same, and further that when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same.

XIX.

That in the month of March, 1901, said Albert Steinfeld called upon said J. N. Curtis to prepare a written report of "the 1177 mines and mining properties of the Silver Bell Copper Company," and that on the 21th day of March, 1901, pursuant to said request, said J. N. Curtis, as the president of said Silver Bell Copper Company, delivered to said Albert Steinfeld a written report and statement, particularly describing the properties of the Silver Bell Copper Company, in which written report he, the said J. N. Curtis, included by description as the property of the Silver Bell Copper Company, all of the said English group of mines and other mines mentioned in Finding XXII, but without in any manner segregating or grouping the same; that said Albert Steinfeld, in said month of March and in the month of April, 1901, circulated said written report and delivered copies thereof to various and different people and, over his signature, to this plaintiff as being a correct report of the mines and mining properties belonging to said Silver Bell Copper Company; and that thereafter and at various and different times said Albert Steinfeld furnished to this plaintiff written reports over his signature of the properties belonging to said Silver Bell Copper Company.

That Albert Steinfeld did not at any time prior to the purchase from the English owners of their title to the English group of

mines make any direct or express promise or representation to the Nielsen Mining and Smelting Company or the Silver Bell Copper Company or to any officer or director of said company, that
 1178 he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines or the title of the English owners to the English group of mines for the use or benefit of the said company.

XX.

On April 3, 1903, said Albert Steinfeld wrote a certain letter to one G. A. Beaton, giving him an option upon and, whereby he agreed that he would convey or cause to be conveyed for the sum of \$515,000 all of the said properties as one entire property, including therein all mines and properties standing in the name of J. N. Curtis, Albert Steinfeld and of said Mammoth Copper Company in said Silver Bell mining district, which, in addition to the mines standing in the name of said Silver Bell Copper Company would include the mines standing in the name of said J. N. Curtis, and the said English group of mines standing in the name of said Albert Steinfeld and said Mammoth Copper Company and said two mines so purchased from said Nielsen & Lewis standing in the name of said Albert Steinfeld. That at the time said price of \$515,000 was fixed for said entire properties, said Steinfeld intended to renew and permit the corporation to accept the terms of the proposition dated July 15, 1901 as extended on October 1st, 1901, and the officers of said Silver Bell Copper Company expected the corporation to avail itself of said offer so that the whole of said price would be paid to and become the property of said Silver Bell Copper
 1179 Company. That on the 13th day of May, 1903, said Albert Steinfeld formally reported to the board of directors of said Silver Bell Copper Company in session, that he had made or given on behalf of himself and the Mammoth Copper Company and of the Silver Bell Copper Company a written option to George A. Beaton of New York City and his assigns, for the sale amongst other things of all the property rights, interests and assets of the said Silver Bell corporation; and requested that his action in so doing be confirmed, and thereupon and upon such request, he voting therefor his action in giving said option for said purchase price was confirmed. That the option to said Beaton was taken by him for the Imperial Copper Company and the sale thereafter consummated to the Imperial Copper Co. to all of the properties described in Finding XXII was, under and by virtue of said option and for the purchase price of \$515,000 named therein.

XXI.

That negotiations for and concerning said sale were continuous from the time of the giving of said option to said Beaton down to and including the 20th day of May, 1903. That said Albert Steinfeld personally conducted said negotiations, by and on behalf of said Silver Bell Copper Company, with said Imperial Copper Company and said Beaton and the attorneys of said Imperial Copper Company,

and caused S. M. Franklin, his personal attorney and the attorney for said Silver Bell Copper Company to take part in said negotiations and to assist in the preparation of all contracts and papers, and to do other work in connection with said sale, said S. M. Franklin during all said negotiations acting as the attorney for said Silver Bell Copper Company, on the direction of said Steinfeld.

XXII.

That said sale was consummated on May 20, 1903, and the mines and mining properties sold to the Imperial Copper Company on the 20th day of May, 1903, were the following:

Mammoth or Old Boot, Copper, Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F. Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B. Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, and Enterprise;

That of said mines, the following named mines were those which were known as the English group of mines, namely:

Herbert, Confidence, Black Daisy, Black Eagle, Imperial, Pima, John F. Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B. Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, Enterprise.

XXIII.

That pending said negotiations the representatives of the Imperial Copper Company demanded as a condition to the carrying out of said sale that Albert Steinfeld and the Silver Bell Copper Company should guarantee the titles to said Properties and that said Steinfeld did, in pursuance of said demand and insistence of said representatives of the Imperial Copper Company, sign and cause the said Silver Bell Copper Company to sign a document, being defendants' "Exhibit KK."

XXIV.

That under date of 20th day of May, 1903, all of the properties listed and described in the schedule "Exhibit A" attached to plaintiff's complaint and amended complaint on file herein, were sold to the Imperial Copper Company for the purchase price of \$515,000.00. That the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company joined in the deed of conveyance of said properties; that said purchase price of \$515,000.00 under the terms of the sale thereof became payable as follows, to-wit: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,000 in

four equal payments of \$100,000 each, due respectively in
 1182 three, six, nine and twelve months after said 2th day of May,

1903, each of said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the said Silver Bell Copper Company, each of said notes being dated the said 20th day of May, 1903, and bearing interest from said date of payment thereof, at the rate of six (6) per cent, per annum; that the sum of \$115,000.00 in cash was paid by said Imperial Copper Company to and received by said Albert Steinfeld, as the treasurer of the said Silver Bell Copper Company; that the said four promissory notes, each for \$100,000.00 principal, as aforesaid, were delivered to and received by the said Albert Steinfeld, as treasurer of the said Silver Bell Copper Company, and said cash and notes were to be held by said Steinfeld pursuant to the agreement of May 20, 1903, in the next finding set forth.

XXV.

That on the said 20th day of May, 1903, after the said sale was completed, the said Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company, executed an agreement in writing, in the words and figures following, to-wit:

"This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part,
 and the Mammoth Copper Company, a corporation organized
 1183 and existing under the laws of the Territory of Arizona,
 party of the second part, and Albert Steinfeld, of Tucson,
 party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phenix, Ariz., and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

"Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

"Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in
 hand paid, receipt whereof is hereby acknowledged, it is
 1184 hereby mutually agreed that the purchase price paid and to
 be paid upon the sale, shall belong to and be the property of
 the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld, as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said Company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

"In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

1185 That the terms of this agreement, and that it should be executed, were, however, all orally agreed upon before the said sale was completed, or said money was paid, or said notes executed by the said Imperial Copper Company.

XXVI.

That after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company, paid two of said promissory notes, paying the principal thereof, with the interest at said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of the cash paid to the said Silver Bell Copper Company, by said Imperial Copper Company, prior to January 1st, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said "Exhibit A" of the sum of \$319,487.50; that the said sums of money aggregating the said sum of \$319,487.50, were received by the said Silver Bell Copper Company from the Imperial Copper Company, as and for the first cash payment, and as the payments of the two promissory notes first falling due on the purchase price of said sale so made to said Imperial Copper Company. That of said sum there was regularly paid out for and on account of certain debts and contracts of the Silver Bell Copper Company, a total of \$118,000.00, including the sum of \$18,117.00 paid to Albert Steinfeld May 21st, 1903.

1186

XXVII.

That after the conclusion of said sale to said Imperial Copper Company, and after all papers had been delivered in connection with the said sale and the negotiations in connection therewith, and on May 20, 1903, the board of directors of said Silver Bell Copper

Company convened; the following are the records of the minutes of said meeting, viz:

"A meeting of the directors of the Silver Bell Copper Company was held at the office of the company in Tucson, Arizona, on May 20, 1903, at 4 o'clock P. M., pursuant to call of the President.

Present: J. N. Curtis, President; Albert Steinfeld, Director, R. K. Shelton, Director.

The President reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Benton, had agreed to purchase all the mining claims of this company in the Silver Bell Mining District, Pima County, Arizona, and all the machinery, plant and personal property used therewith; also all of the mining claims and personal property used therewith, of the Mammoth Copper Company, as well as certain other mines or interests therein which stand in the name of Albert Steinfeld, and in the individual name of the President, and to pay therefor the sum of \$515,000, as follows: the sum of \$115,000 in cash, which
1187 sum it did pay, and is now in the hands of Albert Steinfeld,

Treasurer; and the balance, \$400,000 in four equal installments of \$100,000, each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent per annum; and for which deferred payments said company executed to this company its four promissory notes, which now are also in the hands of the Treasurer.

He further reported that the necessary deeds and agreement had been executed by the President and Secretary of this Company and amongst others a Guarantee Agreement which Guarantee Agreement was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld, individually. The said agreements were read and considered.

He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company had again submitted for acceptance, the proposition which he had heretofore submitted in writing on July 15th, 1901, with the modifications, however, that this company shall pay to him forthwith in cash, the sums of money which in said proposition were required to be paid on

October 15th, 1901, to-wit: the sum of \$15,192.45, and also
1188 shall forthwith pay in cash, interest thereon from October 15, 1901, to this date at the rate of 1 per cent, per month amounting to \$2,924.55, making a total of \$18,117.00 and that this company shall also assume and pay all obligations, which he said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company, and keep him free and harmless from any and all expenses and loss, which may arise to him by reason of any claim or asserted claim, of any person whatsoever, for or on account of, or

arising out of or connected with the present sale, and negotiations, or any past negotiations or transactions, in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy, the commissions which he, said Steinfeld agreed to pay to said Murphy, to-wit: the sum of \$25,000, said agreement being made for and on behalf of this company; and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one, J. M. Burnett, for commissions.

Also that this company shall indemnify him against loss, damage or expense, by reason of his having guaranteed the titles to the mining claims sold, or agreed to be sold, to said Imperial Copper Company, as is set forth in the Guarantee Agreement heretofore submitted to this meeting.

1189 The President also stated that it was necessary to adjust with the Mammoth Copper Company, the disposition that was to be made of the purchase money upon the sale; He then submitted the agreement between this company, the said Mammoth Copper Company and Albert Steinfeld on this point and also covering the matter of guarantee:

After a full consideration the following resolutions were unanimously adopted, to-wit:

Resolved, that all the acts of the President and Secretary of this corporation, and all papers, agreements and deeds signed by them, for or on behalf of this corporation in the matter of the negotiation and sale of this Company's property to the Imperial Copper Company, be, and the same hereby are ratified, approved and confirmed.

Resolved, that the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he (said Steinfeld) be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen (18,117) dollars, and that out of the first moneys received by this Company upon the promissory notes of the Imperial Copper Company, he, said Steinfeld, as Treasurer of this Company, shall retain sufficient moneys to pay the amounts necessary to be paid to Margaret Francis and Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Nielsen (he being now deceased) and to Mary Nielsen, the amount necessary to be

1190 paid under the agreement with said Niensens aforesaid; and when said amounts respectively become due, to pay the same to the parties entitled thereto.

Resolved, that Albert Steinfeld as Treasurer of this Company be, and he is, hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

Resolved, that the President and Secretary of this corporation be, and they hereby are, authorized, empowered and directed, in such manner and form, as they deem necessary or proper, to indemnify said Steinfeld, against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper Company; and that he, and they hereby are, authorized, empowered and directed to do or cause to be done all things and to execute all papers,

documents or other writings, which they deem necessary in the premises.

Resolved, that the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld be, and the same is, hereby ratified, approved and confirmed.

The minutes of this meeting were then read and after first 1191 being amended by striking out lines 1 to 16, both inclusive, on page 46 of this book, and striking out part of line 21 and all of lines 22 and 23, on the same page, the same were on motion approved as amended.

On motion the meeting adjourned, subject to the call of the President.

J. N. CURTIS, *President*,
ALBERT STEINFELD, *Director*,
R. K. SHELTON, *Secretary*."

XXVIII.

That in the months of October and November, 1903, said Albert Steinfeld sent all said money, and notes, except \$50,000.00 which had theretofore been attached in a suit by S. M. Franklin, to the California Bank in San Francisco, and deposited the same in said Bank in his individual name. Plaintiff brought an action in the city and county of San Francisco, state of California, against said Albert Steinfeld and said Bank. Defendants' Exhibit "J" is a copy of the complaint in said action. Plaintiff obtained an injunction therein restraining Steinfeld from receiving and said Bank from delivering to him said money or notes.

XXIX.

That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500, and 1192 in said action garnished the sum of \$51,500, as the property of the Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled "S. M. Franklin, Plaintiff, vs. Silver Bell Copper Company, Defendant," and was brought in this court. That after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750 of said \$51,500, in his hands retaining the other \$25,750 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of \$25,750

so left in his hands as security after deducting the money so paid to him said S. M. Franklin.

The said Albert Steinfeld thereafter continued to hold and at the time of commencement of this action still held said sum of \$25,750 as such security, the same being the property of the said Silver Bell Copper Company.

XXX.

That as hereinabove found, said Albert Steinfeld, as treasurer and trustee of the Silver Bell Copper Company, on May 20th, 1903, received from said Imperial Copper Company the sum of \$115,119.000 in cash; That on August 23rd, 1903, one of said four promissory notes was paid, and said Steinfeld, as treasurer and trustee, as aforesaid, received in payment of the same the sum of \$101,500.00; That on November 23rd, 1903, another of said notes was paid and said Steinfeld, as such treasurer and trustee, received in payment of the same, the sum of \$102,987.50, making a total of \$319,487.50 that said Steinfeld as such treasurer and trustee had received by November 23, 1903, from said Imperial Copper Company on account of such purchase price.

That said money was disbursed by said Steinfeld as shown by his account presented and filed on December 26th, 1903, as herein-after found.

XXXI.

That after the controversy arose in the city and county of San Francisco by and between the said plaintiff and the said Albert Steinfeld, resulting in the bringing of the action above referred to, on the 26th day of December, 1903, a meeting of the stockholders of said Silver Bell Copper Company was held at the city of Tucson, County of Pima, Territory of Arizona, at which were present Albert Steinfeld, R. K. Shelton, J. N. Curtis and L. Zeckendorf, Eugene S. Ives, attorney for and representing Albert Steinfeld, and William H. Barnes, representing and attorney for L. Zeckendorf.

XXXII.

That at said meeting of December 26th, 1903, 1194 the following proceedings and discussions took place, to-wit:

"Meeting of the Stockholders of the Silver Bell Copper Company,
Held at the Office of Smith & Ives, Tucson, Arizona, December
26th, 1903, 4.00 p. m.

By Mr. IVES: If you will pardon me for making an opening statement—

We are here to see what we can do. You made us a proposition which was the same as the proposition which was submitted by Mr. Lilienthal in San Francisco.

Now, we are unwilling, at this stage of the game, to do anything.

When I say "we," I mean Mr. Steinfeld, but we want to do things if we can agree. As I gathered, one of the chief contentions of

Mr. Zeckendorf's was that Mr. Steinfeld had the personal custody of the proceeds of these notes, and of the notes, and he objected to it.

Now, since then, he has brought two suits, one attachment or open suit for money in which an attachment has been issued, and the other, a stockholders' suit in which he has obtained an injunction.

Now, we want those suits disposed of. I am talking frankly in that matter—and until disposed of, Mr. Steinfeld is unwilling to agree to anything. He feels his business integrity has been impugned; and he wants them disposed of. Now, we want to meet you as far as we can. We will never be willing to admit that

1195 Mr. Steinfeld had the possession of these moneys wrongfully.

We maintain now, as we maintained then, that he had them by virtue of the agreement which was executed in pursuance of a resolution of the board of directors, which he claims, and we believe was, a valid resolution, and a valid agreement. (I am not arguing that point with you.) He claims that. Now, you have attacked that agreement and the resolution. The prayer of your complaint asks that a receiver be appointed to hold the moneys and the notes in the Bank of California for the benefit of the Silver Bell Copper Company; that an injunction issue restraining Steinfeld from receiving, and the Bank of California from delivering to him said money and notes; that Steinfeld be required to set forth—

(3) That Steinfeld be required to set forth the nature of his claim to said money and notes and the terms of the agreement; and to account to the Silver Bell Copper Company for moneys received.

(4) That the resolution and agreement therein referred to be declared null and void.

(5) That the plaintiff have such other and further relief as may be just in the premises.

The first paragraph, that a receiver be appointed, I will pass.

The second subdivision is your prayer that an injunction issue; that has been issued.

1196 And third, that Mr. Steinfeld be required to set forth the nature of his claim; he has done; he has given you a copy of the resolution which you already had; and he has given you a copy of the agreement which you did not have before, although we stated it as best we could verbally to Mr. Zeckendorf and Mr. Lilienthal in San Francisco.

The fifth, asking for any other or further relief necessarily, I pass.

The fourth paragraph, that the resolution and the agreement herein referred to be declared null and void, we are willing to accede to.

I omitted to state that the third subdivision of your prayer asks, not only that he disclose the nature of his claim, but that he account for the moneys. That account he has rendered, and will be prepared to submit it at this meeting. He has resigned his office of treasurer of the Company, and he has turned over to Mr. Curtis all of the money which by such account appears to have been collected by him and not expended, except \$51,500 00, which has been

garnished in his hands in the Franklin suit, and he has given to the Company a bond with two good sureties in that sum of money, that he will turn over that money to the Silver Bell Copper Company whenever the suit is dismissed, or will turn over the balance, if any judgment should be collected, after paying what amount of money has been adjudged by judgment or otherwise to be due

1197 Mr. Franklin.

So we have set forth the nature of our claim. We have made the account; we have turned over the money. We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and agreement, and relinquish all right whatever to the personal custody of that money, and turn it over to the company.

Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the board) should offer. But first I suggest an organization."

Mr. Shelton reads proposed resolution:

"Resolved, that the agreement executed on May 20th by the President and Secretary of the corporation, the Mammoth Copper Company and Albert Steinfeld, he and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void."

Judge BARNES: We cannot settle the prayer of the complaint here.

Mr. IVES: We are acquiescing in your demand, that is what I mean.

1198 Judge BARNES: Have you got a copy of that contract to attach to that resolution?

Mr. IVES: Yes, I am perfectly willing to do that.

Judge BARNES: And let that go on the minutes?

Mr. IVES: Certainly.

Mr. IVES: I intended this to be a stockholders' meeting. We will now organize as a stockholders' meeting.

Our desire is in good faith to rescind that resolution, but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.

Stockholders' Meeting.

Present: J. N. Curtis, president; R. K. Shelton, secretary.

Stock represented:

Mr. L. Zeckendorf.....	250 shares
Mr. Steinfeld.....	249 shares
Mr. Albert Steinfeld, Trustee.....	330 shares
Mr. R. K. Shelton.....	1 share
Mr. J. N. Curtis.....	170 shares

Total 1,000 shares

Judge BARNES: There is a question about that.

Mr. IVES: That is the way it appears on the books of the Company; that does not consider any question whatever as to the 1199 ownership of the stock; that is the way it appears on the books of the Company for voting purposes, only.

Judge BARNES: As I read the minutes—I have a copy of the minutes—that heretofore in the meetings of the stockholders, 520 shares of stock of this company have stood in the name of L. Zeckendorf & Company, and they have been voted as such at all stockholders' meetings until this. That is an asset of L. Zeckendorf & Co.; never been divided; an asset of the company; would be liable to its debts; the creditors could pursue it; it belongs to L. Zeckendorf & Co.; it does not belong to Mr. Zeckendorf or Mr. Steinfeld, except as they agree to separate it.

Mr. IVES: Has it ever been separated on the books of the company?

Mr. STEINFELD: Yes, sir.

Mr. IVES: As far as the stockholders' meeting is concerned, the books of the company control. There is no waiver with respect to any ownership of stock.

Judge BARNES: We have no objection to passing that resolution on behalf of Mr. Zeckendorf.

I don't care to discuss the questions you have gone over. I don't know as anything is to be gained by it. If the contract of May 20th is rescinded that is all we care for on that point.

Mr. CURTIS: We have not voted on this resolution.

1200 Mr. IVES: Call the roll.

(Mr. Curtis called the roll and the following named stockholders voted "Yes" in favor of said resolution, the names of shares opposite their respective names):

Mr. L. Zeckendorf, 250 shares. Yes.

Mr. Albert Steinfeld, 249 shares. Yes.

Mr. Albert Steinfeld, Trustee, 330 shares. Yes.

Mr. R. K. Shelton, 1 share. Yes.

Mr. J. N. Curtis, 170 shares. Yes.

Mr. IVES: I will change this resolution: "Agreement executed on May 20th, by the President and Secretary of the corporation, with the Mammoth Copper Company with Albert Steinfeld, a copy of which is hereto annexed.

Judge BARNES: Yes, I will see if it is the contract, I think it is.

Mr. IVES: It is a copy of the contract I served you with.

Mr. IVES: I will add that Mr. Steinfeld, in addition to giving Mr. Curtis the money, has given Mr. Curtis an order upon the Bank of California; I mean Mr. Curtis as officer of the corporation, of the Silver Bell Copper Company, an order upon the Bank of California for the money they have, and the notes, so that Mr. Steinfeld no longer makes any claim whatever for the personal custody of either the money or the notes.

Judge BARNES: As a stockholder of this company, Mr.
1201 Zeckendorf protests against the funds of this company being deposited in any other than in the name of the company, by

its treasurer, and he insists as a stockholder, that the treasurer be required to give a bond for the faithful performance of his duties. And he protests against the funds of the company being kept in the name of anybody either as treasurer personally, or in any other manner except in the name of the company, and to be drawn out by the treasurer on direction of the company. If Mr. Steinfeld resigns we will choose another treasurer.

Mr. IVES: The directors will have to choose the treasurer.

Judge BARNES: Mr. Zeckendorf does not object to Mr. Steinfeld being the treasurer of this corporation.

Mr. IVES: I will make a motion in the name of Mr. Steinfeld:

Mr. Steinfeld moves that the funds of the company shall be deposited in the name of the company by its treasurer, and shall not be kept in the name of anyone as trustee or personally, or in any manner except in the name of the company, by its treasurer, and shall be drawn out only by the treasurer at the direction of the company.

We have left out what you said about the bond, for the present anyhow.

Mr. Steinfeld makes that motion. Is that seconded by Mr. Zeckendorf?

Mr. ZECKENDORF: Yes.

1202 The aforesaid resolution put to vote and all the stock voted in favor of the resolution and the same was declared passed.

Judge BARNES: Now with reference as to who shall be treasurer. That is a question for the Board of Directors, and I would suggest on behalf of Mr. Zeckendorf, when they do choose a treasurer that Mr. Zeckendorf has no objection to Mr. Steinfeld being treasurer; but that whoever shall be treasurer they shall give a reasonable bond in proportion to the amount of money in his hands.

Mr. IVES: That is a very large amount of money.

Mr. ZECKENDORF: I think it should be for the amount involved.

Judge BARNES: Yes, for the amount in his hands.

Mr. IVES: That is a most unusual proceeding. We will consider it later.

Judge BARNES: Have you any further business you desire to bring before the meeting?

Mr. IVES: I don't know of any.

Judge BARNES: Now we want to say here at this meeting, Mr. Shelton appears as a Director of the Company. He is an employee of L. Zeckendorf & Co., is not the owner of any stock and therefore he has no right to hold the office of director; he evades it by having

one share of stock transferred to him; he don't own it; it is a
1203 mere evasion of that statute which says that a director must be a stockholder. It means a bona fide stockholder. We have

no objection to Mr. Shelton personally, he is an employee down there; he is down there to serve L. Zeckendorf & Co., and we don't want to embarrass him by having him get into difficulties of this corporation; and we think that this directors' meeting ought to take some action in that particular, if they desire to do it. Mr. Zeckendorf is a minority stockholder, but he is a large stockholder, besides

the assets belong to L. Zeckendorf & Co. He is one of the three men that own this property. This property is all owned by Mr. Steinfeld, Mr. Curtis and Mr. Zeckendorf. Mr. Zeckendorf is the only one not allowed to be a director; and we think that they ought to be directors who are bona fide stockholders.

Mr. IVES: We will consider that. For myself, personally, I see nothing unreasonable in that, but until these suits are disposed of we feel we have gone as far as we care to.

Judge BARNES: There is another matter we desire to bring before you. This company has practically sold its assets, and got nothing left but the proceeds of that sale; it has got cash and notes coming in. There are some obligations. There is an obligation on Mr. Steinfeld's part to guarantee these titles up to the 20th of May; when the last payments are due. Now, these guarantees are matters

that Mr. Zeckendorf regards as of small moment; he would
1204 be willing to assume the obligations of all of them for fifteen or twenty thousand dollars. We do not think that with \$200,000 of money coming in between now and next April, many times more than enough to meet any obligation that can come up, including the suit of Mr. Franklin, or any other threatened suits, or to make good the guarantee of good title up to the 20th of May. That it is an injustice to the stockholders of this company to hold the funds back as against Mr. Franklin's suit; that suit cannot possibly be tried until long after the 20th of April. We think it an injustice to these stockholders to tie up these funds, when there is over \$200,000 coming in, more than ample to pay them. More than that, Mr. Zeckendorf is amply good to protect Mr. Steinfeld to the extent of his interest in this company. We feel that the moneys on hand ought to be divided up: First to the paying of Mrs. Francis, whatever it is; \$12,000 to the paying of Mr. Nielsen; and that the balance of the money ought to be paid to the stockholders; they ought to have the use of the money; and leave it to the last payment to the protection of these obligations. They are not dangerous, to the extent of more than \$50,000 at the outside, and there will be \$100,000 and six per cent interest due on the 20th of May. Mr. Franklin's suit cannot be tried until long after that.

So that, we think that the moneys on hand, the proceeds of the sale of this property, after deducting sufficient to pay Mrs.
1205 Nielsen and Mrs. Francis, that the balance of this money should be distributed, and that there ought to be a dividend made of these funds.

And I will make a still further suggestion. It has been stated here that they are very anxious to have this injunction dismissed. If this be done, and the money be reserved or paid to Mrs. Nielsen and Mrs. Francis and a dividend be made of the money on hands, leaving to the last payment the protection of Mr. Steinfeld's obligations, and also by leaving these notes in the hands of the Bank of California with directions to collect this money and deposit it to the credit of the company. With that done, I am satisfied that Mr. Zeckendorf would be very willing to dismiss the injunction suit.

Mr. IVES: While in all human probability these notes will be

paid, they have not been paid yet. If the Imperial Copper Company should turn out to be unable or unwilling to pay them the mine will come back.

Judge BARNES: And they are good for all these obligations.

Mr. IVES: The mines would come back. Now, whether it would be good policy for this company to distribute all of its funds without any money to work the mines, I concur that that is a question of judgment.

Judge BARNES: These three gentlemen are well able to do that and they can raise money.

Mr. IVES: It won't be long after the notes are paid. I won't say that there won't be any distribution, but I think that these suits should be dismissed without any condition whatever. We have complied with the prayer of your complaint.

Judge BARNES: I won't say whether they will or not. I am simply discussing it as a business policy; that these funds ought to be distributed. The company is not engaged in any business; its mines are sold; if they should come back they would come back free from any obligations. There is no reason why my client, Mr. Zeckendorf, should not have the use of his money, no reason in the world; I think Mr. Curtis has about \$17,000 of his money in it; I don't see why he, Louis Zeckendorf, should not have his.

Mr. IVES: That is a question; it is a matter of policy; and there is a great deal to say in support of the view you take of it. That will be considered. Until the suits are disposed of—

Judge BARNES: Those things will have to be somewhat simultaneously, you cannot expect those things to be done unless they are done as current acts.

Mr. IVES: This is practically a demand by Mr. Zeckendorf who chances to be plaintiff in a suit which it appears to me to be totally without merit—

Judge BARNES: I have not said that; I said we would consider this matter; I have not said what we would do; I simply suggested that it would be wise to consult together—

Mr. IVES: We feel that we should be met now and the injunction suit dismissed and the attachment suit.

Judge BARNES: We will consider that.

Mr. IVES: I will now show you this statement.

(Statement omitted in this copy.)

Mr. IVES: We are not asking you to audit it; we only want you to see what has been done.

Judge BARNES: Now this item of \$51,500 garnishee of Mr. Frank-
n; I don't think that money should be held back from these stock-
holders that is a contested lawsuit, and it will probably not be settled
or two or three years.

Mr. IVES: Mr. Curtis, has Mr. Steinfeld turned over to you as
officer of this company the sum of sixty thousand dollars in money?

Mr. CURTIS: Yes, sir.

Q. You have that money?

A. Yes, sir.

Q. And will now deposit it to the credit of the Silver Bell Copper
company in pursuance of this resolution?

A. Yes, sir.

Q. You have an order upon the Bank of California for the \$49,987.50?

A. Yes, sir.

Q. You have it as officer of this company?

A. Yes, sir.

Q. Signed by Steinfeld, instructing the bank to deliver it to you?

A. Yes, sir; as officer of this company.

Q. And when you get it as officer of this company, you propose to deposit it to the credit of the company in pursuance to
1208 the resolution passed here today?

A. Yes, sir.

By Judge BARNES: Where deposit it?

Mr. IVES: Where do you suggest?

Judge BARNES: The banks here in Tucson are good banks; I don't see why you should go to California.

Mr. IVES: Is that satisfactory to you? Judge Barnes suggests that the money be deposited in the banks here at Tucson.

Mr. ZECKENDORF: I have no objection.

Mr. IVES: Is that satisfactory to you, Mr. Shelton?

Mr. SHELTON: Yes, sir.

Mr. IVES: Then Mr. Curtis you will deposit it here in Tucson.

Mr. IVES: Mr. Curtis, a bond has been given by Mr. Steinfeld for this \$51,500 garnishee of Mr. Franklin's. You have that bond as officer of the company?

A. Yes, sir.

Mr. IVES: Now, Judge, we have gone quite a little distance.

Judge BARNES: Yes, and we will think it over. I think I have stated to you about what Mr. Zeckendorf's feeling is. I don't think we should allow sentiment to trouble us. Mr. Zeckendorf is not pugnacious by any means, but he feels that he is entitled to his dividends and he ought to have his money and he feels that he can make good and that Mr. Steinfeld and Mr. Curtis can
1209 make good whenever the time comes.

Mr. IVES: Is there anything else?

Judge BARNES: We have nothing to offer.

Judge BARNES: Wait a minute; I understood that these three hundred shares acquired from Mrs. Nielsen on which there is payable some \$10,000 is the property of the company——

Mr. IVES: That is a matter we won't discuss; we won't discuss anything whatever until those suits are dismissed.

Judge BARNES: Mr. Zeckendorf claims, and will claim, if the difficulty goes on that those 300 shares belong to L. Zeckendorf and Company, but he is willing to state that they belong to the corporation; he is willing that Mr. Curtis shall have the benefit of that proportion, but we want to know which it is.

Mr. IVES: That is a matter the stockholders have nothing to do with.

Meeting adjourned.

R. K. SHELTON,

Secretary.

That attached to said resolution, above set out, was a copy of the agreement of May 20th, 1903, set out in full in Finding XXV above.

That thereafter at said meeting, the said Albert Steinfeld, as the Treasurer of said Silver Bell Copper Company, submitted to the said stockholders a statement of his account as such treasurer and of the money of said company in his hands as such, showing the receipts and expenditures by him as treasurer of said corporation, of the moneys of said corporation, said statement being as follows, to-wit:

Silver Bell Copper Company.

1903.

May 20.	By Imperial Cop. Co., 1st pay.....	\$115,000.00	
	To telegr. transfr. L. Z. Co., N. Y.....	75,000	
	Less ret.	617	
		874,383.00	
	Commission paid N. O. Murphy.....	22,500.00	
	Albert Steinfeld, Cont.....	18,117.00	
		<u>115,000.00</u>	<u>115,000.00</u>
Aug. 23.	By Imperial Cop. Co., 1st note.....	\$101,500.00	
	To L. Zeckendorf & Co., dep.....	35,000.00	
Sept. 4.	" " " ".....	5,000.00	
Oct. 20.	To F. J. Heney, Contract.....	1,500.00	
	Garnished S. M. Franklin suit.....	51,500.00	
	Balance on hand.....	8,500.00	
		<u>101,500.00</u>	<u>101,500.00</u>
Nov. 23.	By Imperial Cop. Co., 2nd note.....	102,987.50	
	To Smith & Ives Ret.....	500.00	
25.	" " " ".....	1,000.00	
Dec. 26.	Attachment Bank Cal.....	49,987.50	
	Balance on hand.....	51,500.00	
		<u>102,987.50</u>	<u>102,987.50</u>
	Balance on hand, 1st note.....	8,500.00	
	Balance on hand, 2nd note.....	51,500.00	
	Attached Bank Cal.....	49,987.50	
		<u>109,987.50</u>	

That in the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.

XXXIII.

That thereafter on said 26th day of December, 1903, a special meeting of the Board of Directors of said Silver Bell Copper Company was held at which were present J. N. Curtis, R. K. Shelton, Albert Steinfeld and Eugene S. Ives, Attorney for Albert Steinfeld.

That thereupon and at said meeting, Albert Steinfeld resigned as treasurer of said Silver Bell Copper Company, and J. N. Curtis was elected treasurer of said company, and thereupon on motion of R. K. Shelton, acting at the request of said Eugene S. Ives, attorney for said Steinfeld, the following resolution was adopted, viz:

"Whereas, At the twelfth meeting of the Board of Directors of this company held at the office of the company in the city of Tucson on the 20th day of May, 1903, the proceedings whereof appear upon pages 43, 44, 45, 46, 47 and 48 of the minute book of 1212 this corporation, certain resolutions were passed, which said resolutions are set out in full upon said minutes; and,

"Whereas, Simultaneously with the passage of the resolutions, a certain agreement of date May 20th, 1903, was executed and delivered, which said agreement was in the words and figures following, to-wit:

"This agreement, Made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part and Albert Steinfeld of Tucson, party of the third part,

Witnesseth:

Whereas, The parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phenix National Bank of Phenix, Arizona; and,

Whereas, The parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and,

Whereas, The said Albert Steinfeld has assumed certain obligations with said Imperial Copper Company as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, 1213 wherein amongst other things said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and parties of the first and 2nd part- desire to indemnify him against loss by reason of any of said matters or things so done by him;

Now therefore, in consideration of the premises and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed, that the purchase price paid and to be paid upon the said sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000) each, this day executed by the

Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for and as indemnity against loss, damage, or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed, that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of
1214 said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, The said corporation, parties of the first and second part, has caused these presents to be signed by its president and secretary and its corporate seal to be heretunto affixed by resolution of its Board of Directors, and the said Albert Steinfeld has heretunto placed his hand and seal the day and year first above written. In triplicate." And,

Whereas, In pursuance of said agreement four certain promissory notes made by the Imperial Copper Company to the order of the Silver Bell Copper Company were endorsed and turned over to Albert Steinfeld; and,

Whereas, Said Steinfeld duly received the proceeds of the first of said notes and paid out for the benefit of this company a certain proportion thereof; and,

Whereas, The said Steinfeld deposited the three remaining notes with the Bank of California, at San Francisco for collection; and,

Whereas, The said Bank of California presented for collection the first maturing of the said notes, and received the proceeds thereof and turned over to said Steinfeld all of the said proceeds except the sum of \$49,987.50; and,

1215 Whereas, The said bank still has the last mentioned sum and the two remaining notes; and,

Whereas, Louis Zeckendorf, who appears upon the books of this company to own 250 shares of the capital stock of this company in violation of the rights of the said Steinfeld under the said agreement and resolutions, notified the Bank of California not to pay the said sum of Money or to deliver the said notes or the proceeds thereof to the said Steinfeld; and,

Whereas, The said Zeckendorf did thereafter bring suit in the Superior Court of the County of San Francisco and State of California, against this company, the Bank of California, Albert Steinfeld, J. N. Curtis and R. K. Shelton, the directors of this company, wherein he filed his verified complaint, in which said complaint he alleged, referring to the said resolution, as follows:

That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at all, in that said Steinfeld joined in the vote therefor, and in that the other two directors are in the employ of the said Steinfeld and wholly under his control; and in that said Shelton does not own

any shares of stock of said corporation, and in that they were pretended to be adopted at the instigation of said Steinfeld and as part of a claim on his part to defraud said company and its shareholders * * * and said two other directors and defendants

Curtis and Shelton then and there always and still are acting
1216 solely in the interest of and are under the complete control and dominion of said Steinfeld and blindly, and without consideration of the interest of said corporataion, carry out all of his directions.

That it would be a futile and vain proceeding for this plaintiff (Zeckendorf) to demand of said Board of Directors to take proceedings on behalf of said Silver Bell Copper Company against said Steinfeld to recover the moneys and notes so unlawfully held by him, and which he claims to have the right to hold as against said corporation, or to rescind said last mentioned agreement or resolution, because said directors and defendants Curtis and Shelton are acting solely in the interest of and are under the sole control of said Steinfeld and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised; And in which said complaint the said Zeckendor demanded judgment as follows:

(1) That a receiver be appointed to hold said moneys and said notes in said Bank of California for the benefit of said Silver Bell Copper Company, during the pendency of this suit;

(2) That an injunction issue restraining said Steinfeld from receiving, and said Bank of California from delivering to him
1217 said moneys or said notes now in the custody of said Bank of California;

(3) That said Steinfeld be required to set forth the nature of his claim to said moneys and said notes, and the terms of the agreements referred to in said resolutions, and to account to said Silver Bell Copper Company for moneys received or that may hereafter be received by him belonging to said corporation;

(4) That said resolutions and the agreements therein referred to, be declared null and void."

And,

Whereas, The said resolutions were passed by the Board of Directors of this company, and the said agreement was executed by its officers in good faith and with the sole intent and purpose to advance and protect the interest of this company and of all persons concerned, nevertheless in view of the said actions of the said Zeckendorf, the owner of a large portion of the stock of this corporation, and of the charges and allegations which he has made, and of the hostile attitude which he has assumed toward the entire transaction, and in compliance with his wish, prayer and demand, and in order to avoid litigation; and all of the owners of the stock of the said corporation except the said Zeckendorf having been consulted by the directors, and having acquiesced in the foregoing recitations and in this action
1218 about to be taken by this board, and the said Albert Steinfeld and the Mammoth Copper Company having indicated their willingness and consent thereto, and having offered to

sign any paper or papers, and to do upon demand all things and acts necessary to accomplish and consummate a full re-cission of the said agreement; and the said Steinfeld having given to this company an order upon the Bank of California for the said money and notes, and having tendered to this company all of said funds still in his hands, together with a full and complete account of all moneys received and disbursed by him,

Be it Resolved:

(1) That the said resolutions passed by the Directors on the said 20th day of May, 1903, be, and the same are, rescinded and repealed.

(2) That the said agreement heretofore recited in full be rescinded and declared null and void.

(3) That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company which have not yet matured, and to give his proper receipt therefor.

(4) That the officers of this company be instructed to execute with and deliver to said Steinfeld and Mammoth Copper Company, an agreement rescinding the said agreement ab initio and to do and cause to be done all such acts and things as may be necessary to accomplish and consummate the full re-cission of the said agreement; and that J. N. Curtis, the president and treasurer 1219 of the company, be instructed to receive from said Steinfeld the funds tendered by him as hereinbefore recited, and be further instructed to demand and receive from the Bank of California the said money and notes now held by the said bank."

The foregoing resolution was adopted, Mr. Curtis and Mr. Shelton voting in the affirmative, and Mr. Steinfeld being present not voting.

Mr. Steinfeld thereupon made the following statement:

"I concur in the above resolution and consent to the re-cission of the said contract. I have not voted thereon by reason of the fact that it might be stated that I was an interested party."

Mr. Shelton offered the following resolution:

Resolved, That on account of Mr. Albert Steinfeld of funds of the Silver Bell Copper Company, held by him under a certain agreement executed on May 20th, 1903, which has been this day rescinded, which said account is as follows:

Silver Bell Copper Company in Account with Albert Steinfeld.

1903.

May 20. By Imperial Cop. Co., 1st payment.....	\$115,000.00	
May 21. To teleg. trans. L. Zeckendorf & Co., \$75,000.00		
Less ret.	617.00	
		\$74,387.00
To commission paid N. O. Murphy.....		22,500.00
To A. Steinfeld, cont.....		18,117.00
		<u>115,000.00</u> 115,000.00

1220

Aug. 23.	By Imperial Cop. Co., 1st note.....	101,500.00	
Aug. 23.	To L. Zeckendorf & Co., dep.....	35,000.00	
Sep. 4.	T. L. Zeckendorf & Co., dep.....	5,000.00	
Oct. 20.	To F. J. Heney, contract.....	1,500.00	
	To garnishee S. M. Franklin suit.....	51,500.00	
	To balance on hand.....	8,500.00	
		<u>101,500.00</u>	<u>101,500.00</u>
Nov. 23.	By Imperial Cop. Co., 2nd note.....	102,987.50	
Nov. 25.	To Smith & Ives, ret.....	1,500.00	
	To attachment Bank Calif.....	10,987.50	
	Balance on hand.....	51,500.00	
		<u>102,987.50</u>	<u>102,987.50</u>
	Balance on hand, 1st note.....	8,500.00	
	Balance on hand, 2nd note.....	51,500.00	
	Attached Bank of California.....	10,987.50	
			<u>100,987.50</u>

Be, and is hereby audited and approved.

That this plaintiff had no knowledge whatsoever of the holding of said Directors' meeting on the 26th day of December, 1903, until after the 21st day of January, 1904, and had no knowledge until said last mentioned date that any such meeting was planned or contemplated.

That after said directors' meeting and on the said 26th day of December, 1903, and in pursuance of said resolutions of said Directors' meeting an agreement was executed and delivered, which is defendants' Exhibit 8; and in pursuance of said resolution and agreement, on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day said Steinfeld paid to Curtis, treasurer of the Silver Bell Copper Company, the sum of \$18,117.00.

1221

XXXIV.

That on the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to said company except the sum of \$51,500.00 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said treasurer of the said corporation an order upon the Bank of California, authorizing and requiring the said bank to deliver to the said corporation or its duly authorized officer the said money and notes so deposited by him as aforesaid, and the same were, after December 26th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer

of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld.

That on the 9th day of January, 1901, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700.00.

XXXV.

That on the 16th day of January, 1901, defendants Steinfeld, Curtis and Shelton met as Board of Directors of said Silver Bell Copper Company, no one else being present except Eugene S. Ives, the attorney for said Steinfeld, and no one else having any notice or knowledge of such meeting, and as such board at the request of said Ives and Steinfeld, purported to adopt and pass a resolution and cause the same to be spread upon the minute book of said corporation, reading as follows:

"Whereas, the properties of this company together with certain mining properties belonging to and owned by the Mammoth Copper Company and Albert Steinfeld, respectively, were on or about the 20th day of May, 1903, sold to the Imperial Copper Company for the gross sum of \$515,000, payable \$115,000 in cash and the balance in four promissory notes, each for the sum of \$100,000 with interest at the rate of 6 per cent per annum, payable respectively three, six, nine and twelve months after date; and,

"Whereas, deeds properly executed by this company for the properties owned by it, and properly executed by the Mammoth Copper Company for properties owned by it and properly executed by Albert Steinfeld for properties owned by him, have been deposited in escrow with the Phoenix National Bank, to be delivered to the guarantee, in all of such deeds, to-wit, the said Imperial Copper Company, upon the payment of the said notes and all of them, according to the tenor thereof; and

1223 "Whereas, simultaneously with the said sale an agreement was made between this company and the said Mammoth Copper Company, and the said Albert Steinfeld, which provided for the disposition of all of the said purchase price; and,

"Whereas, the said agreement was by consent of all parties thereto and of all parties interested therein, rescinded on or about the 26th day of December, 1903; and,

"Whereas, the said Albert Steinfeld did on or about the 26th day of December, 1903, return to this company, by paying the same to the treasurer thereof, the sum of \$319,487.50 upon said purchase price and consideration for the said agreement rescinded as aforesaid; and,

"Whereas, previous to the said rescission of said agreement the treasurer of this company had received the sum of \$319,487.50 upon the said purchase, and has at this time in his hands two of the said notes, to-wit, the notes becoming due on the 20th day of February, 1901, and the 20th day of May, 1901; and,

"Whereas, Albert Steinfeld and the Mammoth Copper Company jointly do claim that the properties owned by them and sold to the Imperial Copper Company as aforesaid, were and are of far greater

value than the property owned by this company and sold to the Imperial Copper Company as aforesaid; and,

"Whereas, the said Steinfeld and the Mammoth Copper Company acting jointly as aforesaid have asserted their ownership of and
1224 right of possession to more than one-half of the said purchase price, and have offered to accept one-half of the cash received, and one of the said promissory notes in full of all of their claim to any part or portion of the said purchase price; and it appearing by the books of this company that of the said sum of \$319,387.50 the sum of \$25,000 has been paid to N. O. Murphy and A. S. Donau for commissions effecting the said sale, and that the sum of \$3,000 has been paid to attorneys-at-law for services rendered to this company, and the said \$28,000 being properly a charge upon the whole of said purchase price; and,

"Whereas, Selim M. Franklin has brought suit against this company for the sum of \$51,500, and an attachment has been issued in said suit, and the said sum of \$51,500 has been garnished in the hands of Albert Steinfeld, who at the time of said garnishment was holding that portion of the said purchase price in pursuance of the agreement rescinded as aforesaid and up to this date has been held by him; and,

"Whereas, the said Albert Steinfeld has given this company his bond therefor and has now returned to the treasurer of this company \$25,750 thereof, the receipt whereof is hereby acknowledged;

"Now, therefore, be it resolved that upon the receipt from the said Mammoth Copper Company and Albert Steinfeld of a release
1225 jointly and severally of all right and interest in the said purchase price whatsoever, except such as Albert Steinfeld may have as a stockholder of this company, the treasurer of this company be and is hereby authorized and directed to pay to the said Albert Steinfeld the sum of \$145,743.75 in cash, the same being one-half of the said sum of \$319,487.50, the total cash received, less the said sum of \$28,000; and that the treasurer of this company be and is hereby authorized and directed to endorse and deliver to the said Albert Steinfeld one of the said promissory notes."

That said Curtis and Shelton in voting for the adoption of said resolution, and said Curtis in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no person whomsoever, except said Steinfeld and his attorney Eugene S. Ives, and in so voting and acting, said Curtis and Shelton were under the complete dominion and control of said Steinfeld, and voted and acted on his orders and not otherwise.

XXXVI.

That thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company and as such having in his possession the cash and under his control the notes of said company above mentioned, and under no other authority or claimed authority than as heretofore set out, paid to the said Albert Steinfeld of the funds held by him as treasurer of the said Silver Bell Copper Company

then in his, Curtis, hands, as such treasurer, the sum of \$145,-
 1226 \$43.75 in cash (the same being one-half of the sum of \$319,-
 487.50, less the sum of \$28,000) and thereupon delivered to
 said Albert Steinfeld one of said two promissory notes, and which
 said funds and notes said Albert Steinfeld received from said Curtis,
 the treasurer of said Silver Bell Copper Company, and thereupon said
 Steinfeld appropriated said moneys so received and said note to his
 own individual use and not to the use or benefit of any other person
 or corporation whatsoever.

That the said note so delivered to said Albert Steinfeld at the
 time of said delivery was worth the full amount of the principal and
 interest thereof, viz: \$100,000.00 with interest thereon from the 20th
 day of May, 1903, to the 20th day of January, 1904, at the rate of
 six per cent. per annum, and said Steinfeld collected said full sum
 thereon and retained the same to his own use.

That said Steinfeld also retained the sum of \$25,750, the funds
 of said corporation garnished by S. M. Franklin and which still
 remained in his hands as treasurer aforesaid, and which with said
 sum of \$145,743.75 in cash, so paid to him by said J. N. Curtis
 as the treasurer of said company, made a total sum of \$171,493.75
 in cash.

That said Albert Steinfeld collected on said note so delivered to
 him prior to the commencement of this action the sum of \$103,-
 967.00, which with said sum of \$145,743.75, made a total sum of
 1227 \$249,710.75, which said Albert Steinfeld so received from
 said defendant corporation, and all of which said sum before
 the commencement of this action said Albert Steinfeld took
 as his own property, to his own use, and said Albert Steinfeld there-
 after kept the same as his own property and not as the property of
 any other person, firm or corporation, and not for the use or benefit
 of any other person, firm or corporation, and that no part of said sum
 has been paid back to said Silver Bell Copper Company.

XXXVII.

That subsequent to the 10th day of January, 1904, and prior to
 the 16th day of January, 1904, said Silver Bell Copper Company
 collected on the other of said two promissory notes the sum of \$103,-
 967, and which said sum was paid into the treasury of said Silver
 Bell Copper Company.

XXXVIII.

That on the 20th day of January, 1904, the directors of the said
 Silver Bell Copper Company passed a resolution, declaring a divi-
 dend of \$111.00 per share on the capital stock of said Silver Bell
 Copper Company. Said Albert Steinfeld thereupon collected and
 received from the treasurer of said corporation the sum of \$111.00
 per share as such dividend on the 300 shares of stock belonging to
 said Silver Bell Copper Company, standing in his name as trustee,
 as aforesaid, receiving as such dividend on said stock the sum
 1228 of \$33,300.00 and which said sum the said Albert Steinfeld
 thereupon converted to his own use and benefit and not to

the use or benefit of any other person or corporation whatever, and the same has not, nor has any part thereof, been paid to or for the Silver Bell Copper Company, but the whole thereof with interest from the 26th day of January, 1904, at the rate of 5 per cent. per annum remains unpaid. That the said dividend of \$111.00 per share on said 300 shares was paid to the said Albert Steinfeld because of and on account of his control of said corporation. That said money received by said Albert Steinfeld as such dividend on said 300 shares of stock was the money and property of said Silver Bell Copper Company, and said Albert Steinfeld had no right thereto, and had no right to receive the same and convert the same to his own use. That said dividend (except as to said 300 shares of stock standing in the name of Albert Steinfeld as trustee) was regularly declared; That R. K. Shelton was paid and received the sum of \$111.00 on such dividend, being the dividend on the one share of stock standing in his name; That said J. N. Curtis was paid and received the sum of \$18,870.00, being the dividend on 170 shares standing in his name; That said Albert Steinfeld in addition to said \$33,300.00 was paid and received the sum of \$27,639.00, being the dividend on the 249 shares standing in his name and belonging to him. That plaintiff has now been paid and has received the sum of \$27,750.00, being the dividend on 250 shares; the same being accepted by plaintiff without prejudice to this action and under agreement that the same should in no manner affect this action.

XXXIX.

That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; That this plaintiff, in that regard, has employed as attorneys for the bringing of this action for the benefit of the Silver Bell Copper Company, Edwin A. Meserve of Los Angeles, California, and Frank H. Hereford of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action; That ten per cent. of the amount for which judgment is finally given in this action, is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company, as attorneys' fees for bringing and prosecuting this action for its benefit.

XL.

That as hereinabove found, the defendants, Shelton, Curtis and Steinfeld, are the directors of said Silver Bell Copper Company; that said Curtis and Shelton are under the absolute control and dominion of said Steinfeld, and that if any moneys or properties belonging to said corporation should be returned to said corporation, the same would be still in the hands of the same parties and controlled by them and would be again placed under the control of defendant Steinfeld; that it will be unequitable and wrong that said money should again be paid to said corporation and be again placed under the control, dominion and in the custody of said Albert Steinfeld, and it is therefore meet, equitable and proper that a receiver of all of the properties, books and papers of said corporation should be appointed by this Court, in order to receive the money of said corporation and properly apply the same, and that the same further might be properly paid out, used and handled as this Court in the exercise of its discretion may hereafter order, decree and determine.

XLI.

That the \$2,000.00 paid by Steinfeld at the time of the
1231 purchase of the said 300 shares of stock was the personal money of said Steinfeld and that said Zeckendorf knew that Steinfeld had paid the same out of his personal money, for and in behalf of the corporation.

XLII.

That Selim M. Franklin at all the times herein mentioned was an attorney-at-law in active practice in the City of Tucson, and that during all of the said times and prior to the month of June, 1903, was the attorney for the said company and the said L. Zeckendorf & Company and the said Albert Steinfeld, and at no time was under the domination or influence of said Steinfeld so as to do anything in any of the transactions involved in this litigation to the advantage of said Steinfeld and against the interest of said company or the said Zeckendorf.

XLIII.

That at no time prior to about the 20th day of May, 1903, did the Nielsen Mining & Smelting Company or the Silver Bell Copper Company offer or agree to repay to Albert Steinfeld any of the several sums of money, or any part thereof, paid by him to Francis & Volkert, or to the English owners of the English group of mines, except as in these findings set forth.

XLIV.

And at no time prior to about the 20th day of May, 1903, did the
1232 said Nielsen Mining & Smelting Company or the Silver Bell Copper Company agree to assume any obligation which the said Steinfeld incurred in and by the execution of said agreement of date May 16th, 1900, with Francis and Volkert.

XLV.

That all of the money expended by said Steinfeld in the purchase of the Francis and Volkert titles and the English title to the English group of mines, was the personal money of the said Steinfeld, and that at no time did the said Steinfeld offer to loan to the said company any sums of money whatever for the purchase of either of the titles to said group of mines.

Dated this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge*.

Filed October 2, 1908.

Also the following facts found by the Supreme Court of the Territory, as set forth in the opinion of the court:

The authorized capital stock of the company was Twenty-five Thousand (\$25,000.00) Dollars.

Steinfeld did not prevent the Company from purchasing the English group of mines by any representation to the officers of the Company or the Board of Directors that he intended to or would obtain the property for the company.

The Silver Bell Copper Company went into possession of the 1233 English Group of mines after its purchase by Steinfeld, and was given by Steinfeld the right of working the same and treating any ores that might be taken from the same in the company's smelter.

Soon after the purchase by Steinfeld of the English title Curtis consulted with S. M. Franklin, the attorney for the Silver Bell Copper Company, and who was also attorney for L. Zeckendorf & Co., and the defendant Steinfeld, with regard to the ownership of the three hundred shares of stock purchased from Nielsen and the English group. Steinfeld was then claiming to be the owner of both the stock and the mines.

As a result of this action of Curtis, Franklin told Steinfeld that under the circumstances of his purchases, he held both the stock and the English group as trustee for the Silver Bell Copper Company; that because of his relation to the Company he had neither the right to purchase the stock or mines for himself, nor the right to compel the company to assume the purchases without the consent of its stockholders at a meeting at which some other than Steinfeld should vote the shares belonging to L. Zeckendorf & Co., and that if the corporation should then refuse to ratify the transactions, Steinfeld could then rightfully thereafter hold the stock and mines as his own. Acting under this advice on July 15, 1901, Steinfeld handed to Shelton, Secretary of the Company, the proposition of date July 15th, 1901 heretofore found.

1234 During all the times that the proposition of Steinfeld was pending, the Silver Bell Copper Company was in possession of the English group, and worked and operated it in connection with the Old Boot Mine. In 1901, and at other times, Curtis, under the direction of Steinfeld, made various maps and reports of the property, in which the English group was spoken of as part of the Silver Bell Copper Company's property. These maps and reports were sent

to plaintiff and others, and various efforts made by Steinfeld to sell the property as a whole, including the English group.

July 22nd, 1909.

EDWARD KENT,
Chief Justice.

1235 And on to-wit: the thirtieth day of August, 1909, comes Louis Zeckendorf, by his attorneys and files in the clerk's office of said court in said entitled cause a certain Assignment of Errors in words and figures following, to-wit:

In the Supreme Court of the United States.

LOUIS ZECKENDORF, Appellant,

vs.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL — COMPANY, a Corporation, and Mammoth Copper Company, a Corporation, Appellees.

Assignment of Errors.

Now comes the Appellant, Louis Zeckendorf, by Edwin A. Meserve and Frank H. Hereford, Attorneys and says: that in the record and proceedings, aforesaid, of the said Supreme Court of the Territory of Arizona, in the above entitled cause and in the rendition of the final judgment therein, manifest errors have intervened to the prejudice of the said Appellant in this to-wit:

First. Said Supreme Court of the Territory of Arizona, erred in rendering a judgment affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in entering judgment in favor of the 1236 Appellees and against Appellant, on Appellant's first cause of action and costs of suit, entered on the 30 day of July, 1908.

Second. Said Supreme Court of the Territory of Arizona erred in not reversing the said judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, and in not remanding said cause to said District Court for a new trial.

Third. Said Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in making the finding that Steinfeld did not purchase the English Group of Mines for and as the property of the Silver Bell Copper Company (finding 13) for the reason that the said finding is misleading in that it does not show that the said properties were actually purchased by Steinfeld for the Silver Bell Copper Company subject to his intention that they would be claimed by him for Louis Zeckendorf & Company, if he could not purchase for the Silver Bell Copper Company the shares of stock belonging to Nielsen in the Silver Bell Copper Company.

Fourth. The said Supreme Court erred in not reversing the said

judgment of the District Court for the reason that the District Court erred in not finding as a fact that the proposition of July 15, 1237 1901 and the action of the officers and directors of the Silver Bell Copper Company thereon as set forth in finding 17, was by all parties intended to be a declaration of trust, viz: that Steinfeld held the legal title to the English Group of Mines, the Nielsen Mines, to the 300 shares of Nielsen stock in trust for the Silver Bell Copper Company, for the reason that the uncontradicted evidence shows that that was the intent of all parties and that the proposition was made and action taken thereon with the object of accomplishing that proposition.

Fifth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not finding as a fact that Steinfeld did orally and in writing assert and declare that he was going to purchase the English Group of Mines and the said Nielsen shares of stock for the Silver Bell Copper Company, for the reason that he did so declare and assert orally and in letters to Louis Zeckendorf.

Sixth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not finding as a fact, that Steinfeld repeatedly to Zeckendorf and others declare- in writing that the English Group of Mines was the property of the Silver Bell Copper Company for the reason that Steinfeld did so declare in his letters to Zeckendorf and 1238 others and did in effect so declare in causing the said president of the Silver Bell Copper Company to make reports and maps describing the said group of mines as belonging to the Silver Bell Copper Company, and in sending out the said reports and maps over his, Steinfeld's, signature as being correct reports and maps.

Seventh. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not finding as a fact that the acts of Steinfeld in purchasing the English group of Mines, the Nielsen Mines and the Nielsen stock and all thereof, were his acts as agent of the Silver Bell Copper Company, for the reason that the said acts were each and all performed with the knowledge on his part of the necessity of their being performed by an agent or representative of the Silver Bell Copper Company; with the knowledge of the fact that he knew of the necessity of their performance solely by reason of his being agent of the Silver Bell Copper Company and on the knowledge of the fact that he had assumed and was performing and was expected to perform all services of that character for and on behalf of the Silver Bell Copper Company.

Eighth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not finding as a fact, that Steinfeld in purchasing and taking 1239 the legal title to the English Group of Mines, the Nielsen Mines and the 300 shares of Nielsen stock, did so in trust as an agent of the Silver Bell Copper Company, and that the titles of said properties was taken in Steinfeld's name, solely for the purposes of protecting and advancing the best interests of the corporation for the reason that the evidence shows that Steinfeld was the

agent of the corporation, having charge and control of its entire business and property upon whom rested the entire responsibility of doing everything in such matters as was for the best interests of the corporation, and the said purchase being as shown by the evidence for the best interest of the said corporation.

Ninth. Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in finding that Steinfeld had at no time offered to loan the Silver Bell Copper Company any money for the purchase of either of the titles to the English Group of Mines for the reason that the said finding is misleading in this, that Steinfeld did advance the money for the benefit of the Silver Bell Copper Company, and so declared in letters to Zeckendorf, which advances were intended as loans to the Silver Bell Copper Company.

Tenth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court 1210 erred in not rendering judgment for the Silver Bell Copper Company, upon what is termed the first cause of action, viz: the return of the money paid to Steinfeld under the theory that he was the owner of the English Group of Mines, for the reason that the evidence shows that he never at any time was such owner, but at all times held the said mines and all thereof as the trustee, constructive and expressed of the Silver Bell Copper Company, and that the said sums of money and all thereof were paid to the said Steinfeld without any consideration or right and in fraud of the rights of the stockholders of the Silver Bell Copper Company.

Eleventh. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in granting Appellees' (Defendants') motion retaxing costs for the reason that the Supreme Court of the Territory of Arizona as such has no power directly to tax costs, but such power must be expressed by instructing the lower court to enter costs in accordance with the provisions of the Statutes of the Territory of Arizona.

Twelfth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in only awarding the Appellant (Plaintiff) the sum of \$2652.50 out of the money recovered and to be recovered by the Silver Bell Copper Company, from Albert Steinfeld herein, 1241 as and for Attorney's fees, for the reason that the said sum is wholly inadequate; is not a just and reasonable compensation for the services performed by the said attorneys nor is it commensurate with the services rendered the Silver Bell Copper Company herein.

Thirteenth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in deciding that Albert Steinfeld was neither an express nor a constructive trustee for the Silver Bell Copper Company for the reason that the testimony shows conclusively that he was both an express and constructive trustee for the Silver Bell Copper Company, in the purchase of the English Group of Mines.

Fourteenth. The Supreme Court erred in rendering judgment

against Appellant and in favor of Appellee for costs of suit in said Supreme Court.

Wherefore, the said Louis Zeckendorf, Appellant herein, prays that for the errors aforesaid, and other errors appearing in the record of said Supreme Court of the Territory of Arizona, in the above entitled cause to the prejudice of Appellant the said judgment of the said Supreme Court of the Territory of Arizona be reversed, annulled and for naught esteemed, and that said cause be remanded to the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, with instructions for granting a new trial in said cause, and for such further proceedings in such cause as may be determined by this Honorable Court, to the end that justice may be done in the premises.

EDWIN A. MESERVE,

FRANK H. HEREFORD,

Attorneys for Appellant.

And on the same day, to-wit: the thirtieth day of August, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Stipulation in words and figures following, to wit:

1243 In the Supreme Court of the United States,

LOUIS ZECKENDORF, Appellant,

vs.

ALBERT STEINFELD et al., Appellees,

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

Stipulation.

Whereas, on the 30th day of July, 1908, a judgment and decree was duly rendered and entered in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in an action pending in said court wherein Louis Zeckendorf was plaintiff, and Albert Steinfeld and others were defendants, from which judgment and decree both parties appealed to the Supreme Court of the Territory of Arizona; and

Whereas, both said appeals were thereafter heard by said Supreme Court and submitted upon a single record, and thereafter and on the 20th day of March, 1909, the said Supreme Court, but one opinion being delivered, in all things affirmed the judgment of said District Court upon both appeals, and caused a single judgment, so affirming the judgment appealed from, to be entered in the records of said Supreme Court; and

Whereas, both parties thereafter prayed an appeal to the Supreme Court of the United States, both of which appeals were allowed and have been duly perfected and citation duly served; and

Whereas, it is believed by counsel to be unnecessary to forward to the Clerk of the United States Supreme Court a transcript of the record in the Supreme Court of the Territory of Arizona upon both said appeals;

Now therefore, (the Court permitting) it is hereby stipulated that but the single transcript of the record of the Supreme Court of the Territory of Arizona shall be sent to the Supreme Court of the United States, and that such transcript shall be deemed the transcript upon each and both of said appeals, and that said appeals may be heard and argued together as one cause, upon the one record.

Dated August 28th, 1909.

EDWIN A. MESERVE,

FRANK H. HEREFORD,

Counsel for Louis Zeckendorf.

FRANCIS J. HENEY,

EUGENE S. IVES,

Counsel for Albert Steinfeld and Others.

1245 UNITED STATES OF AMERICA,

Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy of the Transcript of the Record, including the Abstract of Record, Supplemental Abstract of Record as corrected with original papers on file, Stipulation, Opinion, Judgment, Motion for Rehearing, Application for Appeal, Affidavit of Value and Allowance of Appeal (Steinfeld, et al.), Bond on Appeal (Steinfeld et al.), Assignments of Error (Steinfeld, et al.), Bond on Appeal (Zeckendorf), Statement of Facts, Assignments of Error (Zeckendorf), Stipulation, and all minute entries had and entered of record in a certain cause lately pending in said Court, No. 1101, wherein Louis Zeckendorf was Appellant and Appellee, and Albert Steinfeld, et al., were Appellees and Appellants, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Citations and Orders
1246 of Enlargement are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 31st day of August, A. D. 1909, at Phoenix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,

Clerk Supreme Court.

By ANGIE B. PARKER, *Deputy.*

1217 In the Supreme Court of the United States.

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

Citation.

The United States of America to Albert Steinfeld, J. N. Curtis, R. K. Shelton, and Silver Bell Copper Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at the session of the Supreme Court of the United States to be holden in the City of Washington, District of Columbia, on the 12th day of July, 1909, pursuant to an appeal duly allowed by the Honorable Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, on the 12th day of May, 1909, and duly filed with the clerk of the said court, from a judgment rendered in the said Supreme Court of the Territory of Arizona on the 20th day of March, 1909, in an action on appeal to that court, wherein you were appellee, and Albert Steinfeld, J. N. Curtis, R. K. Shelton and Silver Bell Copper Company were appellants, to show cause, if any there be, why the said judgment rendered against the said appellants and in your favor should not be set aside, reversed, corrected and why speedy justice should not be done to the party in whose behalf the said appeal is allowed.

1248 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of May, 1909.

EDWARD KENT,

*Chief Justice of the Supreme Court of the
Territory of Arizona.*

1249 [Endorsed:] No. 1101. Supreme Court, United States. Albert Steinfeld et al., Appellants, vs. Louis Zeckendorf, Appellee. Citation. Copy served this 14th day of May, 1909, on Frank H. Hereford, Atty for Appellee. Filed May 15, 1909. F. A. Tritle, Jr., Clerk.

1250 In the Supreme Court of the United States.

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

*Order Enlarging Time for Docketing and Filing Record in the
Supreme Court of the United States.*

The above named appellants having appealed to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona, and good cause having been shown why

the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered, That the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be, and the same is, hereby enlarged until and including the Sixth day of September, 1909, and the return day of the citation heretofore filed and served upon such appeal is hereby enlarged and extended until said last named day.

Dated June 19th, 1909.

EDWARD KENT,

Chief Justice Supreme Court, Territory of Arizona.

1251 [Endorsed:] No. 1101. In the Supreme Court of the United States. Albert Steinfeld et al., Appellants, vs. Louis Zeckendorf, Appellee. Order enlarging time for docketing and filing record in the Supreme Court of the United States. Filed ———, 1909. No. 1101. In the Supreme Court of the Territory of Arizona. Filed June 19, 1909. F. A. Tritle, Jr., Clerk.

1252 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Arizona, on the First day of May, A. D. 1909; in a case wherein Louis Zeckendorf is appellant and you appellees, to show cause if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this first day of June, A. D., 1909.

EDWARD KENT,

*Chief Justice of the Supreme Court
of the Territory of Arizona.*

1253 [Endorsed:] In the Supreme Court of the United States. Louis Zeckendorf, Appellant, vs. Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, Appellees. Citation. Service of the within citation and receipt of a copy thereof admitted this 10th day of June, 1909. Francis J. Heney, Eugene S. Ives, Solicitors for Appellees. No. 1101. Filed June 19, 1909. F. A. Tritle, Jr., Clerk.

1254 In the Supreme Court of the Territory of Arizona.

LOUIS ZECKENDORF, Appellant,

vs.

ALBERT STEINFELD et al., Appellees.

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF, Appellee.

Order Extending and Enlarging Time.

The time to serve and the time to make return of service of citation on appeal and of such citation and the time for the Clerk to transmit and file papers on the appeals to the Supreme Court of the United States, and the time to do and perform the different acts and things required to be done by the appellants and particularly by L. Zeckendorf as appellant, from the judgment from which he appeals; and the time to do the several acts required to be done by the Clerk in connection with the taking and perfecting of said appeal and appeals, is hereby extended and enlarged sixty (60) days, in addition to the times respectively allowed by law within which each of said acts, respectively, is to be done.

Dated July 26th, 1909.

EDWARD KENT,

Chief Justice.

1255 [Endorsed:] No. 1101. In the Supreme Court of the United States, Louis Zeckendorf, Appellant, vs. Albert Steinfeld et al., Appellees. Order enlarging time for docketing and filing record in the Supreme Court of the United States. No. 1101. In the Supreme Court of the Territory of Arizona, Louis Zeckendorf, Appellant, vs. Albert Steinfeld et al., Appellees. Order enlarging time for docketing and filing record in the Supreme Court of the United States. Filed July 29, 1909. F. A. Tritle, Jr., Clerk. By Angie B. Parker, Deputy.

Endorsed on cover. File No. 21,848. Arizona Territory Supreme Court. Term No. 139. Louis Zeckendorf, appellant, vs. Albert Steinfeld, J. N. Curtis, R. K. Shelton et al. File No. 21,849. Term No. 140. Albert Steinfeld, J. N. Curtis, R. K. Shelton et al., appellants, vs. Louis Zeckendorf and Silver Bell Copper Company. Filed October 4th, 1909. File Nos. 21,848 and 21,849.

FILED
JAN 1 1911
JAMES A. WELLS

IN THE
Supreme Court
OF THE
United States

Louis Zeckendorf,

Plaintiff-Appellant,

vs.

Albert Selsfield, J. N. Curtis, R.
K. Shelton, The Mammoth Cop-
per Company, a corporation,
and the Silver Hill Copper Com-
pany, a corporation,

Defendants-Appellants.

No. 139.

BRIEF OF PLAINTIFF-APPELLANT.

FRANK H. HENKOLD,

EDWIN A. MERRILL,

Attorneys for Plaintiff-Appellant.



IN THE

Supreme Court

OF THE

United States

Louis Zeckendorf,

Plaintiff-Appellant,

vs.

Albert Steinfeld, J. N. Curtis, R.

**K. Shelton, The Mammoth Copper Company, a corporation,
and the Silver Bell Copper Company, a corporation,**

Defendants-Appellants.

BRIEF OF PLAINTIFF-APPELLANT.

Both parties to this action have appealed to this Honorable Court from the decree of the Supreme Court of the Territory of Arizona, and for the purpose of distinguishing them, we will hereinafter call Louis Zeckendorf, the plaintiff-appellant, and the other parties, the defendants-appellants.

Subsequent to its judgment and decree the Supreme Court of Arizona, for the purposes of the

appeal to this Honorable Court, adopted as a statement of facts in the nature of a special verdict, the facts as found by the trial court. [Transcript of record, pp. 468 *et seq.* folios 1139, *et seq.*] Adding a few facts found by itself. [Trans. of rec., pp. 512-13, fols. 1232-4.]

In rendering its decision, the Supreme Court of Arizona gave a condensed statement of the case, following the statement with its conclusions and judgment. [Trans. of rec., pp. 441-8, fols. 1081-96.] We believe that in making this condensed statement, the Supreme Court of Arizona overlooked certain vital facts contained in its findings and incorrectly condensed others, all of which, if given due consideration, would have led the Arizona Supreme Court to a wholly different conclusion and decree. To the end that we may concisely make our statement of the case to this Honorable Court, and at the same time direct the attention of this Honorable Court to the questions of fact to which we feel the Supreme Court of Arizona failed to give due consideration, we take the statement of the case made by the Supreme Court of Arizona in its decision, inserting in brackets and in italics, certain additions, certain references to the findings and certain quotations from the findings. We believe that this is necessary to a full understanding of the case by this court.

STATEMENT OF THE CASE.

“This is the second appeal which has been taken
“in this cause to this court. We reversed the case
“on the first appeal upon the ground that the
“judgment which was entered in the court below
“was not sustained by the findings. 86 Pac. 7.
“The cause was remanded for a new trial. Upon
“the second trial, by stipulation of counsel, the
“case was submitted upon the evidence put in
“upon the first trial, except that certain testi-
“mony, deemed by the parties immaterial under
“the issues, was eliminated. As this record is
“voluminous, and as both parties have appealed
“from the judgment, a full statement of the facts
“is made necessary for a complete understanding
“of the questions presented for our determina-
“tion.

“Louis Zeckendorf, as a stockholder of the Sil-
“ver Bell Copper Company and in its behalf,
“brought this suit against Albert Steinfeld, R. K.
“Shelton and J. N. Curtis, individually and as
“officers and directors of said company, and
“against the Mammoth Copper Company, to re-
“cover for said Silver Bell Copper Company the
“sum of \$338,710.15 and 300 shares of the stock
“of the latter which he alleged had been wrong-
“fully appropriated by the defendant Steinfeld,
“and to be in his possession, and which rightfully
“was the property of the said company; that this
“wrongful appropriation was made through the

“aid and assistance of the defendants Shelton and
“Curtis, as directors of the Silver Bell Copper
“Company. The plaintiff prayed for an account-
“ing, the return of the money and shares of stock
“alleged to have been thus appropriated, and for
“costs, attorney’s fees and the appointment of a
“receiver. The answer of the defendants con-
“tained a general and specific denial of the wrong-
“doing complained of, and set up that the money
“and shares of stock sued for, were the property
“of Steinfeld and rightfully in his possession;
“that this money represented in part the pro-
“ceeds from a sale of mining property which had
“been purchased by him and held in his own
“name; and which had been sold in conjunction
“with property belonging to the Silver Bell Cop-
“per Company; that the remainder of the money
“had been rightfully paid Steinfeld in the way of
“dividends upon the shares of stock of the Silver
“Bell Copper Company owned by him and stand-
“ing in his name, including the 300 shares of
“stock mentioned in the complaint; and that these
“dividends had been declared from the proceeds
“derived from the sale of the mining property be-
“longing to the company.

“The court below gave judgment for the plain-
“tiff for the sum of \$20,800.00, being the amount
“of the dividends declared upon said 300 shares
“of stock after deducting a certain sum paid out
“by Steinfeld in the purchase of the same from

“the original owner, and denied him any relief
“upon the cause of action set up in the complaint
“based upon the alleged misappropriation of the
“proceeds of the sale of the mining property
“claimed by Steinfeld as his individual property,
“the title to which was in his name. The court
“appointed a receiver to disburse the money thus
“adjudged to be wrongfully appropriated, among
“the stockholders of the Silver Bell Copper Com-
“pany and to close up the affairs of the latter
“company. From this judgment both parties
“have appealed.

“The court found the facts to be as follows:
“From 1878, and during all the times herein men-
“tioned, the plaintiff Louis Zeckendorf and the
“defendant Albert Steinfeld were partners en-
“gaged in the mercantile business in Tucson, un-
“der the name of L. Zeckendorf & Co. The de-
“fendant Steinfeld, under the terms of the part-
“nership, was the active manager and in the con-
“trol of the business of the firm. The plaintiff
“was a resident of the city of New York, and only
“occasionally visited the territory. As ancillary
“to their business, the firm became more or less
“interested in various mining enterprises.”
*[Zeckendorf owned about 64% and Steinfeld
about 36% of the business, but the profits of the
business were divided in a different ratio, and
after the payment of debts due the firm from any
such mining investment, the shares of stock in the*

investment, were to be considered profits and divided equally. Transcript of record, Ex. 2, made part of finding V, page 472, fols. 1147-8 and pages 433-40, fols. 1061-78.]

"A property situated in Pima county, known as "the 'Old Boot Mine,' [or Mammoth Mine, Finding 2, pages 469-70, fols. 1142-4], "prior to January, 1899, was held by Steinfeld as trustee for "William Zeckendorf and his wife Julia Zeckendorf. One Carl Nielsen had been given a contract by Steinfeld for working and operating "said property on a royalty, and had become indebted to the firm of L. Zeckendorf & Co., in "the operation of the mine. On the said last mentioned date, in order to protect the firm on account of this indebtedness, Steinfeld caused a "corporation to be formed under the name of the "Neilsen Mining & Smelting Company, to which "was transferred Neilsen's interest under this "contract, the machinery and other personal property owned by him and used in its operation, in "consideration of all of its capital stock," [*viz.*: 1000 shares, transcript of record, pages 213-4, fols. 515-18, made part of Finding I, page 468, fol. 1140], "and the assumption by the corporation of "his debts to L. Zeckendorf & Co. At the time "of the organization of the company, Steinfeld as "trustee for William and Julia Zeckendorf, gave "the corporation an option to purchase the Old "Boot Mine for \$25,000, payable in installments

"of \$2,500 each," [at three month intervals. Finding V, page 473, fol. 1150.] "Nielsen assigned to L. Zeckendorf & Co. 670 shares of the capital stock, and to Steinfeld as trustee, 30 shares of the capital stock, retaining for himself the balance of 300 shares of the capital stock. The firm of L. Zeckendorf & Co. put one share in the name of the defendant Shelton, to qualify him as a director, and gave 170 shares to defendant Curtis, in consideration" [for his services in connection with Nielsen's transfer of property to the corporation. Finding V, page 473, fol. 1151 and] "of services thereafter to be performed by the latter for the company, and retained 499 shares for itself. The authorized capital stock of the company was \$25,000. The defendant Shelton was an employe of L. Zeckendorf & Co." [and at all of the times involved in this action and ever since the incorporation of said Nielsen Mining & Smelting Company or Silver Bell Copper Company, has been and now is but the representative of the said Albert Steinfeld on the board of directors of said company, and at all times involved in this action, voted as ordered, directed and requested by said Albert Steinfeld and not otherwise. That as secretary of said corporation, said R. K. Shelton at all times did as ordered, directed and requested by said Albert Steinfeld." Finding III, page 470, fol.

1145], "and the defendant Curtis had charge of "the mining business of the firm. Curtis was "elected director and president of the company, "and Shelton director and secretary." [*"That for all the times subsequent to June 6, 1903, said J. N. Curtis as a director and other officer of the said Silver Bell Copper Company, was under the complete dominion and control of said Albert Steinfeld and as such director or other officer did whatsoever said Steinfeld requested or directed. At no time and under no circumstances subsequent to June 6th, 1903, did the said J. N. Curtis as director or other officer of the said corporation, do any act, take any step or cast any vote except as requested or directed by the said Albert Steinfeld."* Finding III, page 470, fol. 1145.] "Neilsen was elected a director and became manager and superintendent of the company. Steinfeld, while not an officer or director of the company, was, nevertheless, recognized as the ruling manager of the corporation and was, in fact, "in control through the officers, of its affairs." [*"In complete control of Neilsen Mining & Smelting Company and of said Silver Bell Copper Company, and in absolute control and direction of its business, property and affairs."* Finding III, page 471, fol. 1145. *He not only assumed this power but was accorded it by the other officers and directors.* Finding V, page 473, fol. 1151.] "The name of the corporation was subsequently

“changed to the Silver Bell Copper Company, and
“we will hereafter speak of it by this name.

“Adjacent to and surrounding the Old Boot
“Mine, was a group of mining claims known as
“the English group, which was owned at the time
“of the organization of the corporation, by resi-
“dents of England. On the 1st of January, 1900,
“these mining claims were re-located by one Fran-
“cis and one Volkert, under the claim that the
“title of the English owners had become forfeited.
“Steinfeld, through Curtis and his relation to the
“corporation, and from personal inspection,” [*of
the underground workings of the Mammoth or
Old Boot Mine, which alone disclosed the fact.
And which facts Steinfeld learned primarily from
Curtis, president of the corporation. Findings
6, 8 and 9, pages 474-6, fols. 1152, 1154-7*]
“learned that the English group contained ore
“bodies of great value, and that the ore body in
“the Old Boot Mine extended into the ground
“embraced in the English group, and was ad-
“vised by Curtis that it was [*“very” Finding IX,
page 475, fol. 1156*] desirable that the title to the
“English group should be acquired so that the
“two properties might be held and sold as one
“group, thereby increasing the value of the com-
pany’s property.”

“Early in the year 1900 Steinfeld became dis-
“satisfied with Nielsen’s management of the prop-
“erty and determined to get rid of him by buying

“his shares of stock. Under the advice of Steinfeld the directors discharged Nielsen and appointed Curtis in his place and stopped work on the Old Boot Mine.

“The court found, that Steinfeld’s purposes in closing the mine were to effect a purchase from Nielsen of the 300 shares of stock held by him, and also that the English group of mines might be purchased from the English owners, as well as the Francis-Volkert title, at a nominal or small sum; that, though the mine was paying, and at the time worked at a profit, its closing down was to prevent the owners of the English group from obtaining knowledge that the ore body of the Old Boot property did and would extend into the ground covered by the English group.”

[“That said J. N. Curtis as the president of said Nielsen Mining & Smelting Company, prior to said time, had frequently advised and notified said Albert Steinfeld, and said Albert Steinfeld at all times had known, and said Zeckendorf had been told and informed by said Steinfeld that it was very desirable that said English group of mines, so-called, should be purchased, in order that all of the mines and mining claims surrounding said Mammoth Mine should with it constitute one group, and in order that the whole thereof might be sold as one group and one property, as any intending purchaser would, upon examina-

tion of said Mammoth Mine, soon ascertain that the ore bodies therein probably extended into said English group of mines; and because of the fact that all purchasers of large mining properties desire to control all claims immediately surrounding any developed mine or mines.

That said Albert Steinfeld, before ordering said mine to be closed, and work thereon to be stopped, visited said mine and examined the same, and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in said mines and their tendencies, as above found, and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Finding XXII could or might be sold as one group and one property." Transcript of record, pages 475-6, fol. 1156.]

["That at about the same time said Albert Steinfeld became dissatisfied with the management of said Carl Nielsen and with his work as superintendent and general manager of said mine; and thereupon and in the month of December, 1899, said Albert Steinfeld, without action of or authority from the board of directors of said company assumed to and did discharge said Carl Nielsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the board of directors of said company; and at the same time ordered said Mammoth Mine to

be closed down and all work therein to be stopped, as soon as the coke and ore on hand should be used up. His controlling purpose in so doing being to obtain from Nielsen for the corporation, the ownership of the said 300 shares of stock then owned and held by him, and in order that the English group of mines, so-called, and the Francis-Volkert titles thereto, might be purchased at a nominal or small sum, without the owners thereof obtaining knowledge through the workings of said Mammoth Mine and the showing of ore bodies therein, that said ore bodies probably did and would extend into said English group of mines; and said mine was not shut down because said mine could not have been worked at a profit, for the same could have been worked at a substantial profit." Finding VIII, page 475, fols. 1154-5.]

"At the time of the closing down of the Old "Boot Mine, the Silver Bell Copper Company was "indebted to L. Zeckendorf & Co. about \$30,000 "in excess of the value of matte and bullion held "by the latter as security for the company's indebtedness. On May 16, 1900, Steinfeld purchased the title held by Francis and Volkert to "the English group," [paying them cash from his own funds \$2500.00 and contracting to pay them \$12,500 when the mines were sold, to do each year the assessment work, and to settle by suit or compromise the adverse claims of the English people and certain jumpers. Pages 239-40, fols. 578-81

made part of Findings X and XVII, page 476, 479-85, fols. 1157, 1163-76] "at the same time he "organized the Mammoth Copper Company for "the purpose of taking over this title. The stock "of this company was in fact owned and held by "Steinfeld, individually." [*And this corporation "was but an instrument in the hands of said de-
fendant Albert Steinfeld, used by him for the pur-
pose of transacting certain business for himself
that he did not care to transact in his own name."*
Finding I, page 460, fol. 1142.] "On June 29,
"1900, an agreement was entered into by and be-
"tween Steinfeld and the Silver Bell Copper Com-
"pany, as parties of the first part, and Nielsen and
"his wife, as parties of the second part, whereby
"the latter were to sell to the former the 300 shares
"of stock belonging to Nielsen, together with an
"interest in two mining claims adjoining the Old
"Boot, in consideration of \$2000 to be paid Niel-
"sen in cash, and the further sum of \$10,000
"which was to be paid out of the proceeds" [*"of
the working of said Old Boot or Mammoth Mine."*
Finding XI, pages 476-7, fol. 1158, or] "of a sale
"of said mine. After this agreement was exe-
"cuted the 300 shares of stock were thereupon
"transferred on the books of the company to
"Steinfeld as trustee." [*Steinfeld then directed
that the Mammoth or Old Boot Mine be again
put in operation and again worked and thereupon
and thereafter it and the adjoining mines as one*

property were worked and operated by the said Silver Bell Copper Company. That by the time said mine was re-opened, the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot Mine and adjoining mines were very much less than at the time said Old Boot Mine was closed down by Steinfeld in the spring of 1900 as above found." By reason of which and other things necessarily attendant upon the shut down, "said Silver Bell Copper Company sustained great damage." Finding XIV, page 478, fols. 1160-1. And Steinfeld paid the \$2,000 out of his individual funds. Finding XVII, page 481, fol. 1167-8.] "In December, 1900, Steinfeld went to England and there "acquired the title to the English group from the "English owners and took the titles in his own "name. He paid" ["for his expenses \$2,668.51 and \$5815.63. Finding XVII, pages 480-1, fol. 1167] "for this title with his own money."

"The court found that Steinfeld, in making the "purchases of the Francis-Volkert title and the "English title to the English group, intended that "the property should be his own and not the "property of the Silver Bell Copper Company, but "did have the purpose and intent of offering to "the company the opportunity to take over the "title in consideration of its reimbursing him for "his outlay in acquiring said title; that he expected the corporation would do this, but, should it

“not, he would then hold them as his own. Soon
“after the purchase by Steinfeld of the English
“title,” [*“the question as to the ownership of the
300 shares of stock purchased from Nielsen by
Steinfeld and of the English group of mines,
arose between Steinfeld and Curtis, as president
of the Silver Bell Copper Company, Steinfeld
claiming the absolute ownership of both the shares
of stock and of the mines, and Curtis claiming
that Steinfeld held the same in trust for the com-
pany.” Finding XV, page 478, fol. 1161*].
“Curtis consulted with S. M. Franklin, the at-
“torney for the Silver Bell Copper Company, and
“who was also attorney for L. Zeckendorf & Co.
“and the defendant Steinfeld, with regard to the
“ownership of the 300 shares of stock purchased
“from Nielsen, and the English group. Stein-
“feld was then claiming to be the owner of both
“the stock and the mines. As a result of this ac-
“tion of Curtis, Franklin told Steinfeld that under
“the circumstances of his purchases he held both
“the stock and the English group as trustee for
“the Silver Bell Copper Company, that because
“of his relation to the company he had neither the
“right to purchase the stock or mines for himself
“nor the right to compel the company to assume
“the purchases without the consent of its stock-
“holders at a meeting at which some one other
“than Steinfeld should vote the shares belonging
“to L. Zeckendorf & Co., and that if the corpor-

“ation should then refuse to ratify the transac-
“tions, Steinfeld could then rightfully thereafter
“hold the stock and mines as his own.” [Stein-
feld asked Curtis to send him a check for interest
on the amount expended by Steinfeld, Curtis did
so, but Franklin told Steinfeld he could not collect
the interest until the stockholders had taken ac-
tion, as aforesaid, Steinfeld then returned the
checks to Curtis. Finding XV, page 478, fol.
1162.] “Acting under this advice, on July 15,
“1901, Steinfeld handed to Shelton, secretary of
“the company, an agreement signed by himself
“and addressed to the company, in which he re-
“cited in detail the circumstances of his purchase
“of the English group of mines and of the Niel-
“sen stock and the interest in the mining claims
“held by him, and the terms under which the Niel-
“sen stock purchase was made, and stated his
“willingness to sell and convey both the English
“group and the shares of stock to the company
“upon its paying him the money which he had
“expended in the purchase thereof, with interest,
“and upon its assuming and guaranteeing to
“carry out the terms of the Nielsen contract of
“purchase, as well as the contract of purchase of
“the Francis-Volkert title, on or before October
“15, 1901, and would further agree in writing to
“do the annual assessment work on the mines.
“It was further expressed in the agreement that
“if the company should fail to carry out the terms

"of the proposition, then Steinfeld would" [*be freed from said trust, and would hold all said "titles to the English group of mines" absolutely in his own right and free from any trust whatsoever, and would. Finding XVII, page 483, fol. 1172*]. "Thereafter hold the property as his "own. After the receipt of this document from "Steinfeld, the board of directors of the com- "pany," [*consisting as aforesaid of Steinfeld, Curtis, and Steinfeld's representative, Shelton*], "on the same date adopted a resolution calling for "the holding of a stockholders' meeting to take "appropriate action on Steinfeld's proffer, but no "stockholders meeting was in fact called or held "under this resolution, and no action was taken "by the stockholders under it. On October 1st, "1901, at a meeting of the stockholders" [*directors, Finding XVII, page 484, fols. 1174-5*] "of "the company, it was agreed by Steinfeld, in con- "sideration of the corporation doing the assess- "ment work on the mines for the years 1900, "1901, 1902, to extend his proposition of July 15, "1901, to September 15, 1902. It was resolved "at this meeting that a stockholders meeting "should be called to act on Steinfeld's proposition "not later than September 15, 1902, but no stock- "holders meeting was ever called or held for this "purpose, nor was any action taken by the stock- "holders under this resolution." [*Nor by the directors until the meeting of the directors May*

20th, 1903. *Finding XVII, page 465, fol. 1175.*] "During all the time that the proposition of Steinfeld was pending the Silver Bell Copper Company was in possession of the English group and worked and operated it in connection with the "Old Boot mine." [*From the acquisition of the Francis-Volkert titles and "at all times after July 15, 1901, the Silver Bell Copper Company continued, as it had since November, 1900, to possess, work, and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company."* *Finding XVII, page 485, fols. 1175-6, and Finding XVI, page 479, fols. 1162-3.* "That neither said Albert Steinfeld nor said Mammoth Copper Company at any time after July 15, 1901, made or asserted any claim to, or right in any of said mines or property except such as are recited in the minutes of the meeting of the directors of the Silver Bell Copper Company." *Finding XVIII, page 485, fol. 1176.*] "In 1901 and at other times Curtis, under the direction of Steinfeld, made various maps and reports of the property, in which the English group was spoken "of" [*particularly described. Finding XIX, page 485, fol. 1177*] "as part of the Silver Bell Copper Company's property. These maps and reports "were sent to plaintiff and others," [*by Steinfeld "as being a correct report of the mines and min-*

ing properties belonging to said Silver Bell Copper Company." Finding XIX, page 485, fols. 1177] "and various efforts made by Steinfeld to "sell the property as a whole, including the English group." ["Plaintiff knew nothing of said proposal" (of July 15, 1901) "or of the facts concerning the purchase of said mines, properties or stock, and of the prices paid therefor, or of the circumstances surrounding the same until long after May 20, 1903, except the plaintiff knew that said Steinfeld had, during the year 1899, and the early part of the year 1900, reported to plaintiff that the purchase of the same was desirable and should be accomplished and that said Steinfeld intended for the company, to acquire the same, and further that when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same." Finding XVIII, page 485, fol. 1176.] "As a result of these efforts to sell," ["on April 3, 1903, said Albert Steinfeld wrote a certain letter to one G. A. Beaton, giving him an option upon and whereby he agreed that he would convey or cause to be conveyed for the sum of \$515,000.00 all of the said properties as one entire property, including therein all mines and properties standing in the name of J. N. Curtis, Albert Steinfeld and of said Mammoth Copper Company in said Silver Bell Mining District,

which, in addition to the mines standing in the name of said Silver Bell Copper Company would include the mines standing in the name of J. N. Curtis, and the said English group of mines standing in the name of said Albert Steinfeld and said Mammoth Copper Company and said two mines so purchased from said Nielsen & Lewis standing in the name of said Albert Steinfeld." "On the 13th day of May, 1903, said Albert Steinfeld formally reported to the board of directors of said Silver Bell Copper Company" the giving of this option, on behalf of himself and the others in whose names the mines were standing and his action was by said board, at his request, ratified. The option was taken by Beaton for the Imperial Copper Company, and, Finding XX, page 486, fols. 1178-9] "on May 20, 1903, the Imperial "Copper Company entered into an agreement "with the Silver Bell Copper Company and with "Steinfeld and the Mammoth Copper Company "for the purchase of the entire property for the "sum of \$515,000. In this agreement Steinfeld "individually" [*and the Silver Bell Copper Company*" Finding XXIII, p. 487, fol. 1181] "guaranteed the title to the mines for a definite length "of time. The terms of the sale called for the "payment of \$115,000 cash, and four notes of "\$100,000 each, made payable to the Silver Bell "Copper Company. It was further" [*informally by Steinfeld and Curtis or Shelton or both, Find-*

ing XXV, pages 488-9, fol. 1185] "agreed that
"these notes and their proceeds should be held by
"Steinfeld," [*presumably, though not so stated*]
"until released from his personal obligation in
"guaranteeing said title. On the same day an
"agreement in writing was executed by J. N. Cur-
"tis as president of the Silver Bell Copper Com-
"pany, and in its name and by Steinfeld and the
"Mammoth Copper Company, which read as
"follows:

"This agreement made this 20th day of May,
"1903, between the Silver Bell Copper Company,
"a corporation organized and existing under the
"laws of the territory of Arizona, party of the
"first part, and the Mammoth Copper Company,
"a corporation organized and existing under the
"laws of the territory of Arizona, party of the
"second part, and Albert Steinfeld of Tucson,
"party of the third part, witnesseth:

"Whereas, the parties hereto have this day
"agreed to sell certain mining claims and property
"to the Imperial Copper Company, a corporation,
"as per written agreements heretofore made, and
"deeds for which property are now in escrow with
"the Phoenix National Bank of Phoenix, Ari-
"zona; and

"Whereas, the parties hereto desire to settle
"and determine as between themselves, what dis-
"position shall be made of the proceeds of the
"sale; and

“Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making this sale, and particularly in a certain guarantee agreement, wherein, amongst other things said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

“Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

“And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be paid to the said Albert Steinfeld, as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed

“with the said Imperial Copper Company, or any
“other person whatsoever.

“And it is further agreed that no dividend shall
“be declared by the said Silver Bell Copper Com-
“pany until the stockholders of said company shall
“first have fully indemnified said Albert Stein-
“feld against loss, which might arise to him in the
“future, from or on account of any such obliga-
“tions or liabilities so assumed by him.”

“After the agreement of sale had been exe-
“cuted,” [*and the said \$115,000.00 in cash, and
the said four notes were delivered to and received
by Steinfeld as treasurer of the Silver Bell Cop-
per Company. Finding XXIV, pages 487-8, fols.
1181-2*], “and on the same day the board of di-
“rectors of the Silver Bell Copper Company”
[*still composed as aforesaid, of Steinfeld, Shelton
representing Steinfeld, and Curtis,*] “met to take
“action upon the matter of the sale and the rati-
“fication of the above agreement. The minutes of
“the meeting recite that the president reported
“the fact of the agreement of sale and the terms
“thereof, and also of the agreement between the
“Silver Bell Copper Company, Albert Steinfeld,
“and the Mammoth Copper Company guarantee-
“ing Steinfeld from any loss by virtue of his
“guarantee agreement with the Imperial Copper
“Company. They further recite that Steinfeld
“had again submitted for acceptance the proposi-
“tion which had theretofore been submitted by

"him on the 15th day of July, 1901, and later ex-
 "tended until September 15, 1902, with the addi-
 "tional provisions that the company should as-
 "sume and pay a commission which Steinfeld had
 "agreed to pay for negotiating the sale to the Im-
 "perial Copper Company and should be indemni-
 "fied against loss by reason of another asserted
 "claim for a commission; and further, that the
 "company should indemnify him against loss,
 "damage or expense by reason of his having guar-
 "anteed the titles to the mines sold to the Im-
 "perial Copper Company as set forth in the guar-
 "antee agreement between the Silver Bell Copper
 "Company, the Mammoth Copper Company, and
 "Steinfeld. The minutes further recite that there-
 "upon a resolution was [*resolutions were, Finding*
XXVII, pages 489-91, fols. 1186-9] "adopted ac-
 "cepting Steinfeld's proposition and ratifying, ap-
 "proving and confirming the sale to the Imperial
 "Copper Company and the agreement of indem-
 "nity made by the company with the Mammoth
 "Copper Company and Steinfeld. After the exe-
 "cution of these agreements and the ratification
 "of the same by the board of directors, the pro-
 "ceeds of the sale, including the promissory notes,
 "were turned over to Steinfeld under the agree-
 "ment and by him deposited in a bank in San
 "Francisco" [*"in his individual name," Finding*
XXVIII, p. 492, fol. 1191], "except the sum of
 "\$51,500, which had been attached in a suit

“against the Silver Bell Copper Company, which
“was filed after the sale had been made to the
“Imperial Copper Company. The plaintiff, Zeck-
“endorf, being dissatisfied with the disposition
“made of the proceeds of the sale, brought a suit
“in San Francisco on behalf of the company to
“recover the same.” [*The object sought in said
suit as shown by the complaint, being the rescis-
sion of those resolutions of the board of directors
which gave Steinfeld, personally, instead of Stein-
feld, treasurer, the custody of the money and
notes, pages 251-5, fols. 605-13, made part of
Finding XXVIII, page 492, fol. 1191, and Stein-
feld, Curtis and Shelton, afterwards, speaking
through their attorney Ives, show that they under-
stood this was the object of the suit. Finding
XXXII, pages 493-502, fols. 1194-1211.*] “On
“December 26, 1903, a meeting of the stockholders
“of the Silver Bell Copper Company was held in
“Tucson, at which both Zeckendorf and Steinfeld
“were present and an attorney representing each,
“as were also Shelton and Curtis. The purpose of
“this meeting was to adjust the difficulties which
“had arisen between Zeckendorf and Steinfeld
“growing out of the disposition of the proceeds
“of the sale and the litigation which had been in-
“stituted by Zeckendorf in relation thereto. At
“this meeting a resolution was passed rescinding
“and annulling the agreement of May 20, 1904”
[1903, *Trans. of record, Finding XXXII, pages*

495-6, fols. 1197-9] "and the resolution of the "board of directors of the same date. In the resolu- "tion was set forth a copy of the agreement of May "20th and the resolution of the board specifically "referred to, and both were declared to be null "and void. This action of the stockholders was "taken with the consent and acquiescence of all "the parties to the agreement of May 20th." [*At this meeting Steinfeld declared that he had re- signed his office of treasurer, and had turned over to Curtis all the money which he held as such, and had given Curtis an order on the "bank in San Francisco" for the money and notes deposited as aforesaid by Steinfeld in said bank, and no longer claimed their personal custody. Finding XXXII, pages 493-5, fols. 1194-7 and pages 493-501, fols. 1194-1211 and finding XXXII', pages 506-7, fol. 1221. "That in the stockholders meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20th, 1903, and the reso- lution hereinabove mentioned, did not understand or know or believe that anybody claimed or could claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to re-*

scind any portion of the agreement and resolution other than that relating to the indemnity agreement hercinbefore mentioned." Finding XXXII, page 501, fols. 1210-1. The directors named were still Steinfeld, Curtis and Shelton, the latter two of whom were then absolutely under Steinfeld's direction and control, voting as stockholders and directors only as Steinfeld instructed them to. Trans. of record, Finding 3, pages 470-1, fol. 1145.] "After the adjournment of the stockholders meeting, the board of directors of the "Silver Bell Copper Company met and adopted "a similar resolution. At this meeting, Steinfeld resigned as treasurer of the company and "Curtis was elected treasurer in his stead. Steinfeld then paid to Curtis the sum of \$18,117.00 "which had theretofore been paid to him under "the agreement and resolution of May 20th, and "turned over to Curtis all the funds in his hands "of the proceeds of the sale except the sum of "\$51,500.00 which had been garnisheed in said "suit, and gave to Curtis an order upon the Bank "of California to deliver the money and notes "which had been deposited by him as aforesaid." [Steinfeld at said meeting presented his account as treasurer showing amongst other things the payment to himself of the \$18,117.00, and after the meeting adjourned Steinfeld repaid Curtis as treasurer said sum of \$18,117.00. Finding XXXIII, pages 505-6, fols. 1219-20. Be-

sides the directors the only person present at said meeting was Eugene S. Ives, and the resolution was "on motion of R. K. Shelton acting at the request of said Eugene S. Ives, attorney for Steinfeld," adopted. Finding XXXIII, pages 502-5, fols. 1211-19.] "On "January 16th, the board of directors of the Silver Bell Copper Company," [still consisting of Steinfeld and Curtis and Shelton] "met and "adopted" ["purported to adopt and pass." Finding XXXV, page 507, fol. 1222] "a resolution "partitioning the proceeds of the sale to the Imperial Copper Company, then in the treasury of "the Silver Bell Copper Company, between Steinfeld and the company. Under the terms of this "partition, Steinfeld received the sum of \$145,- "743.75 and one of the promissory notes for "\$100,000.00 given by the Imperial Copper Company as the amount due him of the proceeds of "the sale of the English group of mines, the title "to which he held. There was present at this "meeting Shelton, Curtis, Steinfeld and Eugene "S. Ives, the latter acting as the attorney for "Steinfeld." ["No one else having any notice or knowledge of such meeting." "That said Shelton and Curtis in voting for the adoption of said resolution, and said Curtis in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no persons whomsoever, except said Steinfeld and his attor-

ney Eugene S. Ives, and in so voting and acting, said Curtis and Shelton were under the complete dominion and control of said Steinfeld, and voted and acted on his orders and not otherwise." Finding XXXV, page 58, fol. 1225.] "On the "20th day of January, 1904, the directors of the "company again met and passed a resolution declaring a dividend of \$111 per share of the capital stock of the Silver Bell Copper Company. "Under this dividend the sum of \$33,300 was paid "Steinfeld on the 300 shares standing in his name "as trustee, and which had been purchased from "Nielsen."

"The court, in addition to these facts, found "that all the moneys paid out by Steinfeld in the "purchase of the Francis-Volkert title and the "English title to the English group of mines, and "the \$2,000 paid in the purchase of the 300 shares "of stock, was the personal money of Steinfeld, "and that at no time prior to the 20th day of May, "1903, did the Silver Bell Copper Company offer "or agree to repay Steinfeld any of said money, "or to assume any obligation which Steinfeld had "incurred in the purchase of the Francis-Volkert "title."

Steinfeld collected the principal and interest of this \$100,000.00 note. Zeckendorf, the plaintiff in this suit, is as a stockholder of the Silver Bell Copper Co. and on its behalf suing Steinfeld and the other defendants seeking to compel him and

then to pay back this money, with some other smaller amounts, to the Silver Bell Copper Co.

Assignment of Errors in Printed Record.

Now comes the appellant, Louis Zeckendorf, by Edwin A. Meserve and Frank H. Hereford, attorneys, and says: that in the record and proceedings, aforesaid, of the said Supreme Court of the territory of Arizona, in the above-entitled cause and in the rendition of the final judgment therein, manifest errors have intervened to the prejudice of the said appellant in this, to-wit:

First. Said Supreme Court of the territory of Arizona erred in rendering a judgment affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, in entering judgment in favor of the appellees and against appellant, on appellant's first cause of action and costs of suit, entered on the 30th day of July, 1908.

Second. Said Supreme Court of the territory of Arizona erred in not reversing the said judgment of the District Court of the First Judicial District of the territory of Arizona, in and for the county of Pima, and in not remanding said cause to said district court for a new trial.

Third. Said Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in making the finding that Steinfeld did not purchase the English

Group of Mines for and as the property of the Silver Bell Copper Company [finding XIII], for the reason that the said finding is misleading in that it does not show that the said properties were actually purchased by Steinfeld for the Silver Bell Copper Company subject to his intention that they would be claimed by him for Louis Zeckendorf & Company, if he could not purchase for the Silver Bell Copper Company the shares of stock belonging to Nielsen in the Silver Bell Copper Company.

Fourth. The said Supreme Court erred in not reversing the said judgment of the district court for the reason that the district court erred in not finding as a fact that the proposition of July 15, 1901, and the action of the officers and directors of the Silver Bell Copper Company thereon as set forth in finding XVII, was by all parties intended to be a declaration of trust, viz: that Steinfeld held the legal title to the English Group of Mines, the Nielsen Mines, to the 300 shares of Nielsen stock in trust for the Silver Bell Copper Company, for the reason that the uncontradicted evidence shows that that was the intent of all parties and that the proposition was made and action taken thereon with the object of accomplishing that proposition.

Fifth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in not finding as a fact that Steinfeld did orally and in writing assert and declare that he was going to purchase

the English Group of Mines and the said Nielsen shares of stock for the Silver Bell Copper Company, for the reason that he did so declare and assert orally and in letters to Louis Zeckendorf.

Sixth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in not finding, as a fact, that Steinfeld repeatedly to Zeckendorf and others declared in writing that the English Group of Mines was the property of the Silver Bell Copper Company for the reason that Steinfeld did so declare in his letters to Zeckendorf and others and did in effect so declare in causing the said president of the Silver Bell Copper Company to make reports and maps describing the said group of mines as belonging to the Silver Bell Copper Company, and in sending out the said reports and maps over his, Steinfeld's signature, as being correct reports and maps.

Seventh. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in not finding as a fact that the acts of Steinfeld in purchasing the English Group of Mines, the Nielsen Mines and the Nielsen stock and all thereof, were his acts as agent of the Silver Bell Copper Company, for the reason that the said acts were each and all performed with the knowledge on his part of the necessity of their being performed by an agent or representative of the Silver Bell Copper

Company; with the knowledge of the fact that he knew of the necessity of their performance solely by reason of his being agent of the Silver Bell Copper Company and on the knowledge of the fact that he had assumed and was performing and was expected to perform all services of that character for and on behalf of the Silver Bell Copper Company.

Eighth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in not finding as a fact that Steinfeld in purchasing and taking the legal title to the English Group of Mines, the Nielsen Mines and the 300 shares of Nielsen stock, did so in trust as an agent of the Silver Bell Copper Company, and that the titles of said properties were taken in Steinfeld's name, solely for the purposes of protecting and advancing the best interests of the corporation for the reason that the evidence shows that Steinfeld was the agent of the corporation, having charge and control of its entire business and property upon whom rested the entire responsibility of doing everything in such matters as was for the best interests of the corporation, and the said purchase being as shown by the evidence for the best interest of the said corporation.

Ninth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in finding

that Steinfeld had at no time offered to loan the Silver Bell Copper Company any money for the purchase of either of the titles to the English Group of Mines for the reason that the said finding is misleading in this, that Steinfeld did advance the money for the benefit of the Silver Bell Copper Company, and so declared in letters to Zeckendorf, which advances were intended as loans to the Silver Bell Copper Company.

Tenth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in not rendering judgment for the Silver Bell Copper Company, upon what is termed the first cause of action, viz.: the return of the money paid to Steinfeld under the theory that he was the owner of the English Group of Mines, for the reason that the evidence shows that he never at any time was such owner, but at all times held the said mines and all thereof as the trustee, constructive and expressed, of the Silver Bell Copper Company, and that the said sums of money and all thereof were paid to the said Steinfeld without any consideration or right and in fraud of the rights of the stockholders of the Silver Bell Copper Company.

Eleventh: The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in granting appellees' (defendants') motion retaxing

costs for the reason that the Supreme Court of the territory of Arizona as such has no power directly to tax costs, but such power must be expressed by instructing the lower court to enter costs in accordance with the provisions of the statutes of the territory of Arizona.

Twelfth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in only awarding the appellant (plaintiff) the sum of \$2652.50 out of the money recovered and to be recovered by the Silver Bell Copper Company from Albert Steinfeld herein, as and for attorney's fees, for the reason that the said sum, if wholly inadequate, is not a just and reasonable compensation for the services performed by the said attorneys, nor is it commensurate with the services rendered the Silver Bell Copper Company herein.

Thirteenth. The Supreme Court erred in not reversing the judgment of the district court for the reason that the district court erred in deciding that Albert Steinfeld was neither an express nor a constructive trustee for the Silver Bell Copper Company for the reason that the testimony shows conclusively that he was both an express and constructive trustee for the Silver Bell Copper Company, in the purchase of the English Group of Mines.

Fourteenth. The Supreme Court erred in ren-

dering judgment against appellant and in favor of appellee for costs of suit in said Supreme Court.

Wherefore, the said Louis Zeckendorf, appellant herein, prays that for the errors aforesaid, and other errors appearing in the record of said Supreme Court of the territory of Arizona, in the above entitled cause to the prejudice of appellant the said judgment of the said Supreme Court of the territory of Arizona be reversed, annulled and for naught esteemed, and that said cause be remanded to the District Court of the First Judicial District of the territory of Arizona, in and for the county of Pima, with instructions for granting a new trial in said cause, and for such further proceedings in such cause as may be determined by this honorable court, to the end that justice may be done in the premises.

EDWIN A. MESERVE,

FRANK H. HEREFORD,

Attorneys for Appellant.

Additional Assignments of Error.

The foregoing assignments of error are contained in the record, and were made at the time of the perfecting of the appeal to this court. We feel, however, that the plaintiff-appellant should avail himself of the right, under the rules, to make assignments of error at the time he files his brief, and make additional assignments in order

that the argument which now follows may, without question, be covered by his assignments. We believe that the general assignments do cover the entire argument, but, in matters of this kind, there should be no question or doubt.

A. The Supreme Court of the territory of Arizona erred in not finding or concluding, as a matter of law, from the findings made by the lower court and adopted by the Supreme Court, that Albert Steinfeld and the Mammoth Copper Company were trustees respectively for the Silver Bell Copper Company in the holding of the Francis-Volkert and English titles to the English Group of Mines.

B. The Supreme Court of the territory of Arizona erred in finding, as a conclusion of law, that Albert Steinfeld was not an express trustee of the Silver Bell Copper Company in holding the titles to the English Group of Mines.

C. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law, that the agreement or proposition of July 15th, 1901, did not continue in force until the action of an independent stockholders' meeting, and thereafter did not continue in full force and effect until its acceptance on May 20th, 1903, and did not further continue thereafter as an accepted contract or agreement.

The court erred in not finding that said proposition or agreement was to continue in full force

and effect until rejected by the stockholders, the same never having been rejected by the stockholders, having in effect been affirmed by the stockholders at the first stockholders' meeting of the corporation after July 15th, 1901, and which was held on December 26th, 1903.

D. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law, from the findings of the lower court adopted by the Supreme Court of Arizona, that the Silver Bell Copper Company was the owner of the entire mining property sold to the Imperial Copper Company May 20th, 1903, and in not finding, as a conclusion of law, from said findings, that, during the entire time, particularly during the years 1901, 1902 and 1903, up to the time of said sale, the Silver Bell Copper Company was not, in fact and in law, the owner of all of said properties.

E. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law, from said findings so adopted by the Supreme Court, that Albert Steinfeld, having allowed the Silver Bell Copper Company to treat and consider all said properties as its own, and having sold all of said properties for one entire price, and having had said sale confirmed by the Silver Bell Copper Company in the belief, on its part, that it was the owner of all said properties, was estopped, after said sale was completed, and

could not be set aside by said Silver Bell Copper Company, from asserting that said Silver Bell Copper Company was not the owner of all of said properties, and was not entitled to the entire purchase price, less such sums as it owed said Albert Steinfeld and others.

F. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law, from the findings aforesaid, that Steinfeld, on May 20th, 1903, and ever afterwards, was not estopped from claiming, either through himself or the Mammoth Copper Company, that he or the Mammoth Copper Company was the owner of any right, title, or interest in or to the English Group of Mines or the 300 shares of Nielsen stock, or the proceeds or dividends, or either thereof.

G. The Supreme Court of the territory of Arizona erred in finding, as a conclusion of law, that the action of the stockholders, at the stockholders' meeting of December 26th, 1903, operated to authorize or empower the board of directors of the Silver Bell Copper Company (composed of Steinfeld and his two "dummies," Curtis and Shelton) to rescind or set aside any contract or contracts or agreements under, through, or by which the Silver Bell Copper Company became or was entitled to the entire proceeds of the sale of the mines in question to the Imperial Copper Company.

II. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law from the findings aforesaid, adopted by it, that Albert Steinfeld had no authority to pay back to J. N. Curtis, the treasurer of the company, and J. N. Curtis, as treasurer, had no authority to receive back from Albert Steinfeld, on December 26th, 1903, or at any time thereafter, the \$18,117.00 which Albert Steinfeld, as treasurer of the Silver Bell Copper Company, had paid to himself personally, as and being the money with interest thereon, which he had paid out in connection with the purchase of the Francis-Volkert titles and the English titles to the English Group of Mines, and to Nielsen for the purchase of the Nielsen shares of stock and the Nielsen claims.

I. The Supreme Court of the territory of Arizona, having found that none of the stockholders of the Silver Bell Copper Company (which included Steinfeld, Curtis and Shelton), on the 26th day of December, 1903, at the stockholders' meeting held on that day, intended to rescind or set aside any contract or agreement under, through, or by which the Silver Bell Copper Company became or was the owner of or entitled to all of the proceeds of the sale to the Imperial Copper Company, and having found that none of the directors in good faith believed that the stockholders intended any such action, erred in

not finding that the directors and Albert Steinfeld, in particular, committed a fraud on the Silver Bell Copper Company, when he (controlling, as he did, all of the directors) on January 16th, 1904, passed the resolutions of that date dividing the money and the notes representing that purchase price and ordering the treasurer, J. N. Curtis (under the control of Steinfeld) to pay to Steinfeld the money and to deliver to him the note referred to in the proceedings of January 16th, 1904, set out in the findings, and erred in not finding, as a matter of law, that the board of directors on that day, knowing the intent and purpose of the stockholders, committed an actual, intentional fraud on the corporation in passing the resolutions of January 16th, 1904, and in acting, or attempting to act, thereunder.

J. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law from the findings adopted by it, as aforesaid, that all of the money and notes representing the purchase price of the mines aforesaid, on January 16th, 1904, was not the property of the Silver Bell Copper Company, without any claim or right whatsoever thereto or therein, in Albert Steinfeld, except as he was a stockholder of the company.

K. The Supreme Court of the territory of Arizona, having found that R. K. Shelton and J. N. Curtis, at all times after June 6th, 1903,

and particularly on January 16th, 1904, were but the instruments or tools of Albert Steinfeld and were under his complete dominion and control, and did nothing but what he ordered and directed, erred in not finding, as a conclusion of law, that the action of the board of directors taken on January 16th, 1904, was void, and that all money paid thereunder by J. N. Curtis on the orders of said Albert Steinfeld, as found by the Supreme Court, belonged to the Silver Bell Copper Company and should be by Albert Steinfeld paid back to the treasury of the Silver Bell Copper Company, as and being its property.

L. The Supreme Court of the territory of Arizona erred in finding, as a conclusion of law, that the transactions of January 16th, 1904, under, through and by which Albert Steinfeld took over to himself the money sued for in the first cause of action herein, was not presumed to be fraudulent as against the company, and in not finding as a matter of law that it was presumed to be unfair and that, as a matter of law, said transaction should be set aside at the instance of the corporation or of any disaffected stockholder, suing in its behalf.

M. The Supreme Court of the territory of Arizona erred in not finding, as a conclusion of law, that the transactions above referred to, of January 16th, 1904, were at least voidable and presumed to be fraudulent, at the instance of the

corporation or of a disaffected stockholder suing in its behalf, and that the same should be set aside and the money and note (or the proceeds thereof) paid back into the treasury of the company, in the absence of clear and conclusive proof, on the part of the defense, that the transactions were for the benefit of the corporation and not against its interests.

N. The Supreme Court of the territory of Arizona, having found as facts that J. N. Curtis and R. K. Shelton were under the complete dominion and control of Albert Steinfeld and that they did no act whatsoever as an officer or director of the Silver Bell Copper Company except on the orders and directions of Albert Steinfeld and, therefore, having found as a fact that Albert Steinfeld was the sole directing power of the Silver Bell Copper Company, erred in finding, as a matter of law, that the burden was on the plaintiff in this action, suing as a stockholder on behalf of the corporation, to prove that the transaction or transactions of January 16th, 1904, were unfair and not to or against the interests of the corporation and, in holding, as a matter of law, that the burden was on the plaintiff to show that, in fairness and in equity, the transaction should be set aside instead of holding, as a matter of law, that the burden was on the defendants to show, as a matter of fairness and a matter of equity, that the transaction should be sus-

tained and upheld in the interests of the corporation.

O. The Supreme Court of the territory of Arizona, having found the facts as shown in the statement of the case above presented and as set forth in the findings herein, erred in not finding, as a matter of law, that the plaintiff was not entitled to have judgment entered as prayed for in the amended complaint on file herein, and particularly as prayed for in support of the first cause of action set out in the amended complaint.

P. The trial court and the Supreme Court of the territory of Arizona, having found that the plaintiff was entitled to be paid by the corporation for and on account of attorneys' fee, the sum of 10% of the amount recovered herein for the benefit of the corporation, the Supreme Court erred in not giving judgment that the money and note (or the proceeds thereof) turned over to Albert Steinfeld under the resolution of January 16th, 1904, be paid back to the treasurer of the company, and that the plaintiff have judgment against the corporation for 10% of the amount thereof, for and on account of attorneys' fees, in addition to 10% of the amount, for which the court did give judgment in favor of plaintiff and against the defendants.

There are many other errors committed by the Supreme Court of the territory of Arizona in arriving at its judgment in this case in favor of the

defendants on the first cause of action sued on herein, but they are covered by the general assignments above made, and will be brought out in the argument which will follow.

ARGUMENT.

The complaint in this case alleges that Steinfeld was both an express and an implied or constructive trustee of the Silver Bell Copper Company in the ownership of the 300 shares of stock and the so-called "English Group" of mines. The territorial courts found in favor of plaintiff-appellant as to the ownership of the stock, and found facts from which they concluded in favor of defendants-appellants, as to the other property. We believe they were in error in their conclusions in regard to this last described property for the reasons given in this brief.

Albert Steinfeld's relations to the Silver Bell Copper Company and to its officers and stockholders were unique, in that he was at all times in absolute control of (a) its stockholders; (b) the corporate powers and the corporate officers, (c) and its finances.

The corporation was in fact originally but a name, and its records largely Steinfeld's attempts to ratify such action, previously taken by him as he from time to time thought it advisable or necessary to have ratified. Steinfeld had the absolute trust and confidence of certain of the

stockholders, all of whom he represented, and the remaining stockholders were absolutely and completely at his mercy. All of the corporate stock was owned by L. Zeckendorf & Co. and William and Julia Zeckendorf, J. N. Curtis, Carl Nielsen and R. K. Shelton.

(a) L. Zeckendorf & Co., owning 500 shares of the capital stock, was a co-partnership, composed of Louis Zeckendorf, living in New York, and owning about 64% of the business, and Albert Steinfeld, living at Tucson, Arizona, and owning about 36% of it. Steinfeld was the manager of the business under a salary. [Finding V, p. 472, fol. 1148 and Ex. 2, made part of finding, p. 438, fol. 1073.] The profits of the business were divided in different ratios, but after the payment of the debts due the firm by any such mining investment, the shares of mining stock representing the investment were considered profits and divided equally. [Ex. 2 *supra*, pp. 439-40, fols. 1075-8.] Steinfeld as such managing partner of L. Zeckendorf & Co. "was in actual and active control of its business, and its business affairs in said territory, and employed and discharged all its help, and gave and extended all credits, and determined its business policy in all matters and things, in said territory, and in connection with its business therein." [Finding V, p. 472, fol. 1148.] William and Julia Zeckendorf, living in New York City and owning 30

shares of the company's stock, actually owned the Mammoth or Old Boot Mine, which was the original basis of the Silver Bell Company's operations, but the legal title and the power to control and dispose of this mine were by them given to Steinfeld [finding V, pp. 472-3, fols. 1148-51] and their shares of stock were in Steinfeld's name in trust for them [finding II, pp. 469-70, fols. 1143-4]. Louis and William Zeckendorf were Steinfeld's uncles, and Julia Zeckendorf was his aunt. Curtis, owning 170 shares of the company's stock, was an employe of L. Zeckendorf & Co. in charge of its mines and mining property in said territory, and was by L. Zeckendorf & Co. acting through Steinfeld, given his shares of stock for services performed and to be performed. [Finding V, pp. 472-3, fols. 1149-51.] For all times after June 6, 1903, as officer and director he acted and voted only when and as directed by Steinfeld. [Finding III, pp. 470-1, fol. 1145.] Shelton was an employe of L. Zeckendorf & Co., as aforesaid, and really owned none of the stock, but had one share in his name to qualify him as a director, and he at all times as stockholder, director and other officer, voted only when and as directed by Steinfeld. [Finding III, p. 470, fol. 1145.] Carl Nielsen, the remaining stockholder, received his 300 shares in exchange for all the property the corporation owned, he having been compelled to make such surrender

of his property by the difficulties under which he was laboring, principal amongst which was a large indebtedness to L. Zeckendorf & Co. [Finding V, pp. 472-3, fols. 1149-51.]

(b) "Albert Steinfeld, at all times involved in this action and mentioned in these findings, was in fact in complete control of the Nielsen Mining & Smelting Company and of said Silver Bell Copper Company, and in absolute control and direction of its business, property and affairs." [Finding III, p. 471, fol. 1145.] Steinfeld not only assumed this power, but was accorded it by the other officers and directors. [Finding V, p. 473, fol. 1151.] To such an extent was he permitted to exercise this power, that though neither an officer nor director, he discharged Nielsen, who was manager, superintendent and director of the corporation [finding VIII, p. 475, fols. 1154-5], directed Curtis, the president, to locate and hold in his own name, for the corporation, surrounding mines [finding VI, p. 474, fols. 1152-3], and entered into an agreement for a sale and sold all the corporation's property [finding XX, p. 486, fols. 1178-9], though Steinfeld had no direct authority to sell any of the company's property, but he thereafter "requested that his action in so doing be confirmed, and thereupon and upon such request, he voting therefor, his action in giving said option for said purchase price was con-

firmed." [Findings XX and XXI, pp. 486-7, fols. 1178-80.]

(c) Steinfeld's control of the finances and credit of the corporation was equally absolute.

At its formation it assumed a large indebtedness to L. Zeckendorf & Co. [Finding V, p. 473, fols. 1150-1.] It issued to Nielsen 300 of its 1000 shares for property, and issued 700 shares without present consideration and without consideration except as hereinafter shown, to L. Zeckendorf & Co., J. N. Curtis, William and Julia Zeckendorf and R. K. Shelton [finding II, pp. 469-70, fols. 1142-4, and finding V, p. 473, fols. 1150-1], leaving no shares of stock with the proceeds of a sale of which to finance the affairs of the company. The conditions under which it was organized, as shown by the court's findings, leads to but one conclusion, we believe, viz., that its real business was the acquiring of such necessary adjacent mining property and its development as a whole, as would best promote an ultimate sale of the property to mining men, and that previous to the organization of the company it was either expressly or impliedly agreed that L. Zeckendorf & Co. should finance its operations.

Under the laws of Arizona, the capital stock could at any time be increased by Steinfeld, for the statutes of Arizona then and ever since have provided: "The capital stock of any corporation organized therein may be increased, or decreased,

and the articles may be amended in any of the particulars mentioned in section 6 of this title, by the affirmative vote of the majority of the stockholders." (Rev. Stat. of Arizona, year 1901, p. 307, par. 770.) Steinfeld at all times previous to the sale of the company's property could cast this majority vote. [Finding III, pp. 470-1, fols. 1145-6.] The stock unquestionably had value, for as early as December, 1899, Steinfeld discharged Nielsen and closed down the work at the mines, to the great injury and loss of the corporation, partly to force the sale of this stock by Nielsen to him, for the corporation [finding VIII, p. 475, fols. 1154-5], and when he succeeded, he paid Nielsen \$2000.00, partly for the stock and partly for two mines, and agreed later to have him paid \$10,000 more for the stock. [Finding XI, pp. 476-7, fols. 1158-9.] This was more than thirty dollars a share, and as the corporation did not then own anything, except an option to purchase the mine, and was also deeply in debt, the value of the stock was the value of the company's prospects of success.

The corporation never made an effort to get financial aid from any other source, and L. Zeckendorf & Co. never refused it what it required, and it was always in debt to L. Zeckendorf & Co. from \$30,000 in December, 1900 [finding VII, pp. 474-5, fols. 1153-4] to over \$100,000 [finding XXVI, p. 489, fol. 1185, and finding XXX, p.

493, fol. 1193, and finding XXXII, p. 501, fol. 1210] when its property was sold. And all its bullion and products were shipped by and sold through, and the proceeds received by L. Zeckendorf & Co. [Finding V, pp. 473-4, fols. 1152.]

We think that the history of the corporation's business, as shown by these citations, as well as by the findings generally, justify our claim that L. Zeckendorf & Co. from the start financed the business of the corporation under an express or implied agreement that it should do so, and with the object of acquiring such adjacent mines as were necessary, and developing them for the purpose of an ultimate sale of the property as a whole, and that the mining corporation was never organized or its business conducted as a permanent organization for the manufacture or production of copper at a profit.

Having this supreme and unquestioned power over the corporation, its officers, stockholders, affairs and finances, Steinfeld first showed his willingness and ability to handle it to the detriment and injury of one of its stockholders, as such, less than a year after the organization.

"In the fall of 1899, said J. N. Curtis, the then president of the said Nielsen Mining & Smelting Company, advised and informed said Albert Steinfeld that the developments of said Mammoth Mine showed that the ore bodies therein (the same being underground and undeveloped and, except as thus shown, unknown) would run into said Prospector Mine and other mines, belonging

to said English Group of Mines, and that said underground workings of said Mammoth Mine showed that there were probably great values in said English Group of Mines; that at about the same time, said Albert Steinfeld became dissatisfied with the management of said Carl Nielsen and with his work as superintendent and general manager of said mine; and thereupon, and in the month of December, 1899, said Albert Steinfeld without action of or authority from the board of directors of said company, assumed to and did discharge said Carl Nielsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the board of directors of said company; and at the same time ordered said Mammoth Mine to be closed down and all work therein to be stopped, as soon as the ore and coke on hand should be used up. His controlling purpose in so doing being to obtain from Nielsen for the corporation, the ownership of the said 300 shares of stock then owned and held by him, and in order that the English Group of Mines, so-called, and the Francis-Volkert titles thereto might be purchased at a nominal or small sum, without the owners thereof obtaining knowledge through the workings of said Mammoth Mine and the showing of ore bodies therein, that said ore bodies probably did and would extend into said English Group of Mines; and said mine was not shut down because said mine could not have been worked at a profit, for the same could have been worked at a substantial profit." [Finding VIII, p. 475, fols. 1154-5.]

Such shut-down was expensive and caused great loss to the business of the corporation. [Finding XIV, p. 478, fols. 1160-1.]

"That said J. N. Curtis, as the president of said Nielsen Mining & Smelting Company, prior

to said time, had frequently advised and notified said Albert Steinfeld, and said Albert Steinfeld at all times had known, and said Zeckendorf had been told and informed by said Steinfeld that it was very desirable that said English Group of Mines, so-called, should be purchased, in order that all the mines and mining claims surrounding said Mammoth Mine should with it constitute one group, and in order that the whole thereof might be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth Mine, soon ascertain that the ore bodies therein probably extended into said English Group of Mines; and because of the fact that all purchasers of large mining properties desire to control all claims immediately surrounding any developed mines. That said Albert Steinfeld, before ordering said mine to be closed, and work thereon to be stopped, visited said mine and examined the same, and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in the said mines and their tendencies, as above found, and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said finding XXII could or might be sold as one group and one property. That said Albert Steinfeld acquired said information because of the fact that he was acknowledged and conceded to be the actual manager of said Nielsen Mining & Smelting Company, and because of his assumption of such power and of such position, and that he acquired said knowledge and information solely from said J. N. Curtis, the president of the Nielsen Mining & Smelting Company, and from a personal examination of said mine made by him as such assumed and acknowledged actual manager of said company. That said Nielsen being discharged as said superintendent and manager, with personal control

of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the president of said Nielsen Mining & Smelting Company." [Finding IX, pp. 475-6, fols. 1156-7.]

On May 16, 1900, Steinfeld acquired by a most favorable contract with those who are generally called in this action the Francis-Volkert claimants, their title to the "Prospector Mines and others belonging to said English Group of Mines" and which we will hereafter call the "English Group" of mines, being the mines into which the ore bodies of the Mammoth or Old Boot Mine were running. Evidently, however, for the purpose of preventing the 300 shares of stock *then* belonging to Nielsen, from benefiting by this acquisition of this "English Group," he formed a new corporation called the Mammoth Copper Company, in which he, Steinfeld, owned all the shares, including those put in the names of others to qualify them as directors.

"That the said defendant Mammoth Copper Company is now and for all of the times involved in this action has been a corporation, organized and existing under and by virtue of the laws of the territory of Arizona, having its principal place of business at Tucson, Pima county, said territory. That the defendant Albert Steinfeld is now and for all of the times mentioned or involved herein, and ever since the organization of said corporation, has been the owner in fact of all the capital stock of said Mammoth Copper Company, and any stock standing in the name of any other party, was placed in his name in order

to enable such party to qualify as a director and was held by said party for that purpose alone, said stock at all times in fact belonging to and being the property of said Albert Steinfeld. That said Mammoth Copper Company at all times was but an instrument in the hands of said defendant Albert Steinfeld, used by him for the purpose of transacting certain business for himself that he did not care to transact in his own name, that any money which on its face may have been paid to the defendant Albert Steinfeld, and any property which may on its face have been delivered to said Albert Steinfeld for said Mammoth Copper Company, or for the benefit of said Albert Steinfeld and said Mammoth Copper Company, in fact and in truth were paid and delivered to the said Albert Steinfeld as his own individual property and were appropriated by him to his own individual use. That all acts and things done in the name of the said Mammoth Copper Company, and all things and property received, given or paid by, or to, or in the name of the said Mammoth Copper Company, were in fact but acts, things and property done, received, given and paid by and to and for the benefit of the said Albert Steinfeld." [Finding I. p. 469. fols. 1141-2.]

The said Francis-Volkert contract was between Albert Steinfeld as party of the first part, and Margaret Francis and Julius Volkert, parties of the second part. It recites a present consideration of \$1875.00 to be paid by Steinfeld to the parties of the second part; and an additional consideration of \$625.00 to be paid by Steinfeld when the titles of Mrs. Francis' children were delivered to Steinfeld, and an additional consideration

of \$12,500.00 to be paid when Steinfeld should sell the mines referred to in the contract. On the part of the parties of the second part, Francis-Volkert, the consideration was "The conveyance by said second parties to the Mammoth Copper Company, a corporation, of the following named mining claims"; then follows a description of the "Prospector Mine and the other mines belonging to the said 'English Group' of mines."

The deed to these mines made to the Mammoth Copper Company was at the same time executed and delivered to said Steinfeld. The contract also required Steinfeld to use his best endeavors, by law suits or compromise, to defeat any claims of the Tucson Mine & Smelter Company, a British corporation, the English claimants, and certain jumpers, pretending to have made valid locations on the ground, and all such jumpers as in the future should endeavor to locate and claim the ground. The contract also required Steinfeld to do the annual assessment work on the mines and to endeavor to sell them. [Finding X, p. 476, fol. 1157; finding XVII, pp. 483-4, fols. 1173-4, and Ex., made part of said findings, pp. 239-40, fols. 578-81.] Steinfeld paid the said sums of \$1875.00 and \$625.00 out of his own funds.

Evidently Steinfeld not only thus sought to prevent Nielsen, by reason of his being a stockholder in the Silver Bell Copper Company, from

obtaining any interest in the "English Group" of mines, but intended also, if necessary, to withdraw financial support from the Silver Bell Copper Company; declare the option given by him for William and Julia Zeckendorf to the latter company on the Mammoth Mine terminated for the failure of the company to pay the next installment of \$2500.00 due under the terms of the option [finding V, p. 473, fols. 1150-1], thus leaving the Silver Bell Copper Company hopelessly in debt and without property of value, and also to give to the Mammoth Copper Company a new option on the Mammoth or Old Boot Mine, thereby destroying all the value of the shares of stock of the Silver Bell Copper Company held by Nielsen, and transferring all the valuable assets of the Silver Bell Copper Company to the Mammoth Copper Company.

Twenty-three days following the execution of the Francis-Volkert contract, Steinfeld, notwithstanding he was the sole owner of the shares of stock of the Mammoth Copper Company, caused that corporation to execute to him individually two notes and a mortgage on all the mining property it acquired under the Francis-Volkert contract to secure their payment, one of said notes representing Steinfeld's expenditures in acquiring the contract and property from Francis-Volkert, viz., \$2780.00, and the other the amount still due Francis-Volkert, viz., \$12,500.00, he also

caused the said last named corporation to execute to him a written agreement binding it to do these things he was obligated to do in order to complete his contract with Francis-Volkert. [Finding XVII, pp. 479-85, fols. 1163-76.] This, the then intention of Steinfeld will, we think, be further and completely shown when we come to the consideration of the written proposition or proposal made by Steinfeld to the Silver Bell Copper Company thirty-seven days later, or on July 15th, 1901, set out in said finding. Twenty-one days after the execution of this mortgage and these two notes, the then present necessity of providing against Nielsen's participation in the benefits of the purchase of the "English Group" of mines was largely obviated, for Nielsen, probably with knowledge of what Steinfeld had done and would do, entered into a contract under which his shares of stock in the Silver Bell Copper Company passed to Steinfeld as trustee, for the latter company. Had Steinfeld, however, shortly thereafter transferred the title of the "English Group" of mines to the Silver Bell Company, Steinfeld's object and intention would have been too apparent, and at some future and convenient time Nielsen might have sued in equity for the return of his shares of stock. And again, a transfer to the Silver Bell Copper Company by the Mammoth Company of the English mines would probably have been considered the sale contemplated by

Steinfeld's contract with Francis-Volkert, and would have given them then the right to demand and receive the balance of the purchase price of \$12,500 due them on said sale.

After obtaining the deed to the "English Group" of mines from Francis-Volkert, Steinfeld directed that the mining and smelting operations at the Mammoth Mine be resumed, and went to Europe to obtain the English title to the "English Group" of mines from the Tucson Mining & Smelting Company, as he was obligated to do under his contract with the Francis-Volkert claimants. [Finding XIV, p. 478, fols. 1160-1; finding XII, p. 477, fol. 1159.] The purchase price, viz., \$5000 and \$2668.50, were paid out of his own funds, the \$2668.50 being his expenses [finding XII, p. 477, fol. 1159 and finding XVII, pp. 480-1, fols. 1166-7], and Steinfeld had the deed conveying the English title made to himself. [Finding XVII, p. 481, fol. 1167.]

Steinfeld, therefore, held two titles to the "English Group" of mines, one in the name of the Mammoth Copper Company and the other in his own name. In his deal with Nielsen, Steinfeld had also taken the precaution to require Nielsen to deed to him, Steinfeld, for the same consideration of \$2000 hereinabove mentioned, all claims that Nielsen might have to any of the ground embraced within any mines, the title to which was in the Silver Bell Copper Company or

the Mammoth Copper Company, the Francis-Volkert claimants, the English claimants, J. N. Curtis or himself. [Finding XVII, p. 481, fols. 1167-8.]

Not only is the fact thus shown by the findings that the "English Group" of mines were necessary to the proper prosecution of the business of the Silver Bell Company, but that fact is affirmatively alleged by the defendants in their answer, viz.:

"Prior to the organization of the defendant corporation, the Silver Bell Copper Company, the said Steinfeld had appreciated and known that it was important that the 'English Group' of mines should be acquired and owned by someone who would sell the same in one group with the group of mines owned by the said Silver Bell Copper Company and that the said 'English Group' of mines and mines owned by the said Silver Bell Copper Company would, if sold in one group, sell for a larger sum than the total of the sums for which each group of said groups of mines could be sold for separately, and knew that the Old Boot Mine and the other mines owned by the said Silver Bell Copper Company sold alone would not have market value of enough money to reimburse the said firm of L. Zeckendorf & Co. for the amounts owed by the said company to the said firm, and at the same time pay a reasonable compensation to the said Curtis and to the firm of Zeckendorf & Company for the time and attention which the indebtedness of the said company to the said firm had required and made necessary." [Allegations of answer of defendants, p. 350, fols. 834-5.]

Steinfeld communicated to Louis Zeckendorf the information given him by Curtis regarding the lower workings of the Mammoth Mine and showing that the ore bodies ran into the "English Group" of mines; that the "English Group" of mines were probably of great value; Steinfeld's dissatisfaction with Nielsen; his discharge of Nielsen; his closing down of the Mammoth Mine; his purpose in so doing to obtain for the corporation the Nielsen stock, and that the "English Group" of mines might be purchased for a small sum, without their owners obtaining knowledge through the lower workings of the Mammoth Mine, of the trend of the ore bodies; and Steinfeld also communicated to Zeckendorf the fact that when the Mammoth Mine was shut down it was being worked at a profit [finding VIII, p. 475, fols. 1154-55], but the plaintiff, Louis Zeckendorf, knew nothing of the facts concerning the purchase of the "English Group" of mines, and Nielsen stock, or the price paid therefor, or the circumstances surrounding the same, till long after May 20th, 1903, except that during the year 1899, and the early part of 1900, Steinfeld reported to plaintiff that the purchase of these mines and shares of stock was desirable and should be accomplished; *that Steinfeld intended for the company to acquire them*, and that when Steinfeld returned from Europe he advised the plaintiff, Zeckendorf, he had purchased the

English titles to the "English Group" of mines [finding XVIII, p. 485, fol. 1176], and Steinfeld at divers and sundry times in March and April, 1901, and thereafter, sent plaintiff, Zeckendorf, reports and maps prepared by Curtis, at Steinfeld's direction, and which Steinfeld stated were correct reports of the mines and mining properties *belonging* to the Silver Bell Copper Company, and which maps and reports represented that the Silver Bell Copper Company was the owner of the "English Group" of mines. [Finding XIX, p. 485, fol. 1177, and finding XVI, p. 479, fols. 1162-63.] Not only was Louis Zeckendorf thus led to believe that Steinfeld was going to acquire the titles to the "English Group" of mines for the Silver Bell Copper Company, but Curtis was also led to believe the same, for immediately after the purchase of the Francis-Volkert titles to the "English Group" of mines, and on Steinfeld's direction, work was, as aforesaid, resumed upon the Mammoth Mine, and Steinfeld turned the possession of the "English Group" of mines over to the Silver Bell Copper Company and thereafter the Mammoth Mine and the "English Group" of mines were worked and operated by the Silver Bell Copper Company "as its own and as one property, and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company." [Finding XIV, p. 478, fol. 1160, and finding XVII, p. 485, fol. 1176.]

Later and before July 15th, 1901, when Curtis learned that Steinfeld was claiming to own the "English Group" of mines and the 300 shares of Nielsen stock, he not only claimed that Steinfeld bought them as trustee for the corporation, but took such steps hereinafter discussed as made Steinfeld agree that he was such trustee, and "at all times after July 15th, 1901, the Silver Bell Copper Company continued as it had since November, 1900, to possess, work and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company." [Finding XVII, p. 485, fol. 1176.] After the elimination of Nielsen, as aforesaid, the only beneficial owners of the stock in the corporation besides Steinfeld were Curtis, Louis Zeckendorf and William and Julia Zeckendorf. William and Julia Zeckendorf owned but 30 shares and whether before the commencement of this action they ever knew what Steinfeld was doing is not disclosed by the findings, but apart from William and Julia Zeckendorf, Steinfeld unquestionably led the other stockholders of the corporation to believe that he was acting for the corporation in acquiring title to these properties, and we believe and will hereinafter urge that no principle of equity is better established than that an agent such as Steinfeld was could only be protected in the purchasing of

these titles by a convincing showing that the corporation and its stockholders, after being clearly and unquestionably apprised of his alleged intentions to purchase these properties for himself, had taken such action as to negative the idea that the corporation desired to purchase them for itself.

The foregoing facts show that Steinfeld exercised and was permitted to exercise all the powers of the board of directors, a president and a general manager of the corporation; that in the exercise of said powers he learned that the corporation did not own the title to all the ore body which the corporation was working; that the title to the rest of the ore body was necessary for the corporation to have, that he led the stockholders, and particularly the plaintiff, to believe that he was going to acquire the outstanding titles to this ore body for the corporation; that he did acquire it, partially with money supplied by himself, and partly by the use of the corporation's property and credit (shutting down its workings at a great loss to the corporation, and causing it to agree to pay for the property out of the proceeds of the company's property), and by his control of the officers and directors of the corporation; that he concealed from some, at least, of the stockholders the fact that he had used his own money instead of the corporation's money in acquiring the properties; that upon acquiring them, he gave the corporation the possession of them and the use, bene-

fit, supposed ownership and right to make profit out of them, in such a way as to lead the rest of the stockholders and officers of the corporation to believe that the corporation was the actual owner of them.

And we think it at least a fair inference drawn from the facts, that Louis Zeckendorf was led by Steinfeld to look at the business of the corporation as a venture of the firm, the profits or losses of which were to be divided under the general provisions of the firm's articles of partnership, all losses to be borne by the firm, and in which venture Curtis, Nielsen and Shelton were simply employes, receiving in addition to their ordinary compensation a percentage of the profits, without liability for any loss if the venture proved a failure; that Louis Zeckendorf did not think or have reason to think that Steinfeld would attempt to make a personal profit out of this corporate investment of the firm, any more than Steinfeld would attempt to make a personal profit out of an ordinary sale of the firm's goods, or out of the collection of an account due the firm. We also think that, in its equitable aspect, the transaction was as Louis Zeckendorf believed it to be. All the stockholders had their stock issued to them, fully paid and non-assessable. If the venture were a failure, neither Nielsen, Curtis, nor Shelton could lose anything beyond their expected profits; L. Zeckendorf & Co. furnished all the

funds and took all the risks for the sole purpose of giving value to the 500 shares of stock the firm owned in the corporation, and to protect the indebtedness of the firm; and Steinfeld's duty to the firm was to represent its stock held in the corporation for the best interests of this stock owned by the firm and consequently for the best interests of the corporation.

As trustee for all of the Silver Bell Copper Company's stockholders, Steinfeld had received the information that the body of ore the corporation believed that it owned and was working at a profit, and had been formed to work, was not confined to the arbitrary limits of the mining claim to which the corporation had title. It was as though Steinfeld had thus been informed that there was a flaw in the title to the ore body claimed by the corporation, that there was an outstanding title to the ore body, and Steinfeld taking advantage of his power and of the trust and confidence reposed in him by the corporation and its stockholders, sought to buy in this outstanding title and interest for his personal benefit and profit, while leading the stockholders of the corporation to believe that he was purchasing it for the corporation; Steinfeld paid part of the consideration out of his own funds without the knowledge of some of the stockholders, and paid the rest out of the assets of the corporation; for unquestionably the loss and damage that the cor-

poration sustained by the shutting down of its mines, when it was working at a profit, was a part of the consideration paid for the purchase of the Nielsen stock and the "English Group" of mines, for the shutting down of these mines was necessary in order that the title to the mines might be acquired. How large this part of the consideration paid by the corporation was, no one can tell but the defendants in this case (and it was so difficult to get admissions from them against their own interests). The territorial court satisfied itself by finding that the shut-down caused the corporation a great deal of damage. One special cause of the damage was the fact that, between the time that the mine shut down and the time it resumed operations, the price of copper had materially fallen. [Finding XIV, p. 478, fols. 1160-1.]

The general principles of equity applicable to this feature of the case have been, we think, long since firmly and irrevocably established. Probably the most comprehensive view of them is contained in the case of *Trice v. Comstock* (C. C. A.), 121 Fed. p. 620, in which Judge Sanborn uses the following language:

"For reasons of public policy, founded in a profound knowledge of the human intelligence and of the motives that inspire the actions of men, the law peremptorily forbids every one who in a fiduciary relation has acquired information concerning or interest in

the business or property of his correlate, from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of the law is not based upon nor conditioned by the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law, although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or interest he acquired through it to prevent the other from accomplishing the purpose of the relation.

"And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the par-

ties by the established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que* trust, principal and agent, client and attorney, employer and employe, who, through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que* trust, that each work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created."

In the case at bar, the corporation was undoubtedly created for the purpose of working, mining and making valuable an ore body which had been discovered upon the Mammoth Mine, and which subsequent developments in the underground working of the Mammoth Mine disclosed was running beyond the arbitrary limits of the mining claims and into adjoining property belonging to others; that *this ore body was absolutely necessary* to the success of the operations of the Silver Bell Copper Company, is everywhere shown in the history of this case, and is even affirmatively alleged by the defendants in their answer. [Answer, p. 350, fols. 834-5.]

In the case of *Averill v. Barber*, 6 N. Y. (Supp.) 255, nine patents to be used by a corporation in cement work were supposed to be controlled by General Averill, and transferred by him to the corporation. Three directors of the corporation subsequently learned that Averill controlled but seven of these patents, whereupon these three directors procured assignments of the other two patent rights to themselves. A stockholder of the corporation sought to have them declared trustees in the ownership of these two patent rights, for the corporation. The Supreme Court of New York, affirming and copying the opinion of the lower court, said:

“Warren believed that the De Smedt patents were the foundation and security of the whole right to carry on the business of asphalt paving, and every one desired and intended that those patents should belong to and form part of the rights of the American Company; and further than that, the evidence shows conclusively that both McLane and Barber believed those patents did virtually belong to the American Company, for they thought Gen. Averill controlled them, and had put them into that company. There were nine De Smedt patents in all and it seems Gen. Averill had but seven of them. When it was ascertained that the two important De Smedt patents were not controlled by Averill, the defendants, or some of them, above named, sought to procure them. It is not at all important whether they distinctly contracted to do so or not. They knew they were required by the American

Company; that the company was organized to work under them; and they believed those patents to be necessary to the success of that company. Their duty was plain. They were bound to transfer them or hold them for the American Company, of which they were directors. * * * The defendants upon acquiring them, should have tendered them to the company and transferred them on being repaid what they cost; and in not doing so, but holding them for their own profit, they have become liable to the corporation."

Beach, in his work on Trusts and Trustees, lays down the principles:

"It is well established as a rule of equity that where confidence and trust are reposed by one person in another, and the latter accepts the trust, or engages to act upon the confidence reposed, a court of equity will convert him into a trustee whenever it is necessary to the execution of justice, between the parties, or to the protection of the interests of the party exercising the confidence. Where a person takes advantage of a confidential relation which he sustains toward another, or of the confidence reposed in him by another, to gain possession of a property by fraud, the court will declare a constructive trust. But where one sustaining such relation makes use of it to promote his own interests, even though a charge of fraud could not be sustained, a trust by implication of law will be decreed. The confidence reposed in him makes him a trustee. It is not necessary to prove or allege any fraudulent act or purpose."

Beach on Trusts and Trustees, pp. 220, 217, par. 105-106.

These principles of equity, more or less elaborated, are shown to be applicable to the facts of this case by, amongst others, the following cases:

Blake v. Buffalo Creek R. R. Co., 56 N. Y. 485;

Dickinson v. Codwise, 1 Sanfs. Ch. 214;

Davis v. Hamlin, 108 Ill. 39-48 Am. Rep. 541;

Seacoast R. R. Co. v. Wood (N. J.), 56 Atl. 337;

Wardell v. U. P. Ry. Co., 103 U. S. 651-26, L. Ed. 509;

De Bardeleben v. Bessemer, L. & I. Co. (Ala.), 37 So. 511;

Kimberly v. Arms, 129 U. S. 512-32, L. Ed. 764;

Gower v. Andrews, 59 Cal. 119;

Ringo v. Binns, 10 Pet. 269-9, L. Ed. 420,
cited in Trice v. Comstock;

Sun Dance G. M. Co. v. Frost (Ariz.), 64 Pac. 435;

Jansen v. Williams (Neb.), 55 N. W. 279;

Kroegher v. Calinda Col. Co., 119 Fed. 641;

Oliver v. Kastor (Tex.), 101 S. W. 563;

McCourt v. Singers-Briggs, 145 Fed. 103;

2 Pomeroy's Eq. Jur., Chap. VII, particularly Secs. 1089, 1090 and 1094. (See also Secs. 902, 904, 959, 1046, 1076-7, 1079-80, 1090.)

The strongest case offered by defendants-appellants in the territorial courts was Lagardes v. Anniston Lime & Stone Co. (Ala.), 28 So. p. 199, but that case is a very unsatisfactory one because the only language in it sustaining defendants-appellants' contention was *dictum*, and not necessary to the determination made in the case, but in that *dictum* the case was distinguished from the one at bar in several particulars, amongst others in the following:

"It does not appear that the Lagardes had been authorized to conduct such negotiations, and whether they would ever have been resumed is merely conjectural. Proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes purchase in any way impaired the value of the corporation's property."

Lagardes v. Anniston Lime & Stone Company, 28 Southern 199.

The case of Steinbeck v. Bon Homme Mining Company, 152 Fed. 333 (C. C. A.), another case relied upon by defendants-appellants in the lower court, is rather a lengthy decision. Judge Sanborn, speaking for the court, referred to Trice v. Comstock, *supra*, and so clearly drew the lines between these two cases as to emphasize, as we believe, the absence of legal or equitable grounds to sustain the contention of defendants-appellants herein; besides that, the Bon Homme case in

many particulars is distinguished from the case at bar and most emphatically in the following respect:

“He acquired from his agency no knowledge or advantage in making such purchases which strangers and the company itself did not possess. He secured no power by means of his agency to effect injuriously by his purchases the title of his principal. On the other hand, his purchases and his offer in 1897 to convey his title for its costs beneficially affected the title and rights of his principal. They gave the company an opportunity to acquire the property free from tax titles many months after the time when an absolute title would otherwise have vested in a stranger.”

Steinbeck v. Bon Homme Mfg. Co., *supra*.

In the case at bar, Steinfeld's attorney, Franklin, evidently intended that Steinfeld should take just such action as in the foregoing case the court had given sanction to as equitable and just, for the following things occurred:

Sometime previous to July 15, 1901, Curtis learned that Steinfeld was claiming to own the Nielsen stock and a part of the ore body by reason of the purchase and agreement with Nielsen for the purchase of the Nielsen stock, as aforesaid, and by reason of the purchase of the titles to the “English Group” of mines, aforesaid. Curtis went to S. M. Franklin, who was the lawyer for the Silver Bell Copper Company, the individual lawyer for Steinfeld and the lawyer for

L. Zeckendorf & Co.; Franklin informed him that Steinfeld held the stock and the "English Group" of mines as trustee for the corporation. Upon being informed of this advice, Steinfeld wrote Curtis to send him a check for interest on the sums of money expended by him in purchasing the Nielsen stock and the "English Group" of mines; Curtis sent the check and Franklin informed Steinfeld "that it was his duty to give to the company an opportunity, at a meeting of the stockholders at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares, within a reasonable time, to reimburse him for his outlays, and to take over the property if he so desired; and that if the company should not avail itself of this offer, Steinfeld could then hold the properties as his own. After receiving said advice, Steinfeld returned the checks for the interest to Curtis." [Finding XV, pp. 478-9, fols. 1161-2.]

For the purpose of complying with Franklin's advice, Steinfeld, on July 15, 1901, filed with Shelton, secretary of the Silver Bell Copper Company, what is generally denominated the "proposition of July 15, 1901." This proposition was in writing and purported to review the history of the purchase of the Nielsen stock and the titles to the "English Group" of mines, and proposed that if the Silver Bell Copper Company would pay Steinfeld on or before October 15, 1901, the sums of money he had expended in the purchase of

these properties, with interest at the rate of 1% per month, would do the assessment work on the mines and assume Steinfeld's obligations under the terms of the purchase, he would convey all his rights and titles to these properties to the Silver Bell Copper Company, but that in any event he would hold the Nielsen stock in trust subject to the joint agreement of himself and the Silver Bell Copper Company with Nielsen, unless the corporation wished to disaffirm the agreement made by its president with the Niensens in regard to the stock. [Finding XVII, pp. 479-85, fols. 1163-76.]

The board of directors, composed of Curtis, Steinfeld and Shelton, ordered the proposition filed and resolved that a meeting of the stockholders should be called to accept or reject the proposition. No such meeting was ever called or held. On October 1st, the same directors, meeting as a board, accepted a proposal made by Steinfeld to extend the time for the expiration of the proposition from October 15, 1901, to September 15, 1902, and again resolved that a stockholders' meeting be called to accept or reject the proposition, and again no such meeting was ever called or held and no further action was taken thereon by Steinfeld or the corporation until May 20, 1903. [Finding XVII, pp. 484-5, fol. 1175.]

Apart from the above, neither Steinfeld nor the Mammoth Copper Company ever after July

15, 1901, made or asserted any claim or right to the said shares of stock or the "English Group" of mines, or the products thereof, until May 20th, 1903. The plaintiff, L. Zeckendorf, knew nothing of this proposal by Steinfeld, or of any action taken by the board of directors thereon until after May 20th, 1903 [finding XVIII, p. 485, fol. 1176], and the Silver Bell Copper Company continued up to May 20th, 1903, "to possess, work and use and do the assessment work on all of said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company." [Finding XVII, p. 485, fol. 1176.]

Steinfeld alleges in his answer that his reason for taking this attitude was that he believed that Franklin knew the law and was therefore correct in advising him that, as a matter of law, he was a trustee for the Silver Bell Copper Company by reason of the circumstances surrounding the purchase of these shares of stock and the "English Group" of mines. Steinfeld further alleges that he was mistaken, that his mistake was a mistake of law [pp. 353-5, fols. 845-9]. Such a mistake cannot be corrected in this case.

Steinfeld v. Zeckendorf (Ariz.), 86 Pac.
p. 7.

But as the court found, "but in making and in presenting the said proposition, the said Steinfeld was not influenced by the advice given him

by said Franklin concerning his relations and duties to the said company" [finding XVII, p. 484, fols. 1173-4], it would seem that he cannot excuse his action on the ground that he made a mistake of law. If he did make a mistake, it was a mistake of fact, which, in view of the subsequent circumstances, a court of equity could not now relieve him from, even if he had in his pleadings sought such relief, which he has not done.

Conceding for the sake of argument, that Steinfeld did not become a trustee for the Silver Bell Copper Company in the ownership of these properties because of the circumstances under which he purchased them, by this proposition of July 15, 1901, and the acceptance and part performance of it by the Silver Bell Copper Company, Steinfeld became a trustee for the corporation, and the trust was never terminated but under it all rights Steinfeld had conclusively became vested in the corporation on May 20, 1903. When the proposition of July 15, 1901, was drawn by Franklin for Steinfeld [finding XVII, p. 484, fol. 1174], Steinfeld and Curtis, the only two actual directors and officers of the corporation, and also Franklin, the corporation's legal adviser, believed, as aforesaid, Steinfeld was at least an implied or constructive trustee, and the "proposition" was made for the express purpose of bringing this trusteeship before the corporation, "at a meeting of the stockholders, at which L. Zecken-

dorf should vote the L. Zeckendorf & Co. shares,"
* * * "and that if the company should not avail
itself of this offer, Steinfeld could then hold the
properties as his own." [Finding XV, p. 478, fol.
1162; finding XVII, p. 483, fols. 1172-3.]

In other words, the proposition was made with
the express understanding and condition, that the
right of Steinfeld to hold the properties as his
own, would depend upon the action of the cor-
poration at a stockholders' meeting, which could
vote and act, free from control of and through
some one other than Steinfeld or those whom he
controlled. Steinfeld would have, as above point-
ed out, surrendered all claims to the property, and
the proposition of July 15, 1901, would never
have been made, if Franklin, as attorney for the
corporation and Steinfeld, had not stopped him
from so doing until the corporation should have
this right to disaffirm Steinfeld's action, as afore-
said, if it desired to, and therefore this agreement
or condition was a vital part of the proposition.
It was a fair proposition. Ordinarily the board
of directors and not the stockholders, would have
held the power to accept or reject it, but the board
of directors in effect was Steinfeld, and only at
a stockholders' meeting, where L. Zeckendorf &
Co.'s stock was represented by L. Zeckendorf,
could the corporation under Franklin's advice,
act free from Steinfeld's control. The directors
in so far as they were able, under the conditions

and terms of the proposition, accepted it when made, and thereafter and on October 1st, 1901, when Steinfeld extended the time for the stockholders to act upon it, it in express terms "accepted" it, Steinfeld himself voting for the acceptance. [Finding XVII, p. 484, fol. 1175.] The corporation did the assessment work, and on its part performed every other one of the conditions imposed upon it by the proposition EXCEPT SUCH AS STEINFELD DIRECTLY OR INDIRECTLY PREVENTED IT FROM PERFORMING. As before shown, Louis Zeckendorf knew nothing of the said proposition or the circumstances surrounding the same, till long after May 20th, 1903. The control of the corporation and all its powers, has always to the commencement of this suit, remained in Steinfeld, and he never caused the corporation by its stockholders or directors, to disaffirm his said trusteeship, nor has he ever called or caused to be called a stockholders' meeting for the purpose of considering it, but on May 20th, 1903, as we will hereafter urge, he caused it to be affirmed by the corporation and caused all rights under it to vest in the corporation. In the proposition itself, Steinfeld recognized and admitted the fact to be, that a part performance at least by the corporation, would make him the corporation's trustee, using the following language:

"2. That in the event you fail to carry out your said agreement with me to do and pay for the

annual assessment work upon said mining claims, or make either said payment of \$12,500 or said payment of \$10,000, respectively, as above provided, or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute to me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay to me, as aforesaid, and I am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims, and mill sites described in said deed to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatsoever, equitable or otherwise, thereto, or therein." [Finding XVII, p. 483, fol. 1172.]

Later we will urge the full compliance by the corporation of the terms of the proposition and Steinfeld's acceptance thereof. It will be observed that, under the terms of this agreement, Steinfeld was to continue to hold the title to all these properties in trust for the company, unless certain named conditions arose and which never did arise.

Before leaving this branch of the case, we wish to call attention to the language of the proposition evidencing our contention that Steinfeld always had looked upon himself as a trustee for the Silver Bell Company, and actually intended to purchase

all this property for the corporation holding the title in himself as trustee, till the result of his efforts to obtain the Nielsen stock was determined.

Steinfeld, for the same consideration, and as part of the Nielsen deal, obtained from Nielsen and one Lewis, a deed to any interest or claim which they had to any mines or property, the legal or equitable or record title to which was then in either the Nielsen Mining & Smelting Company the Mammoth Copper Company, the English claimants, the Francis-Volkert claimants, J. N. Curtis, or himself. [Finding XVII, p. 481, fol 1167.] (Curtis held in his name certain mines for the Silver Bell Company.) Unquestionably in the transaction he was acting as a trustee for the Silver Bell Company in part at least, and yet he never afterwards by deed or other action, distinguished his action in this matter from his other actions, or claimed as his any title thus acquired to the property of the Silver Bell Company. Again, he, the actual manager of the corporation, states in the proposition:

"I am of the opinion that all of the mining claims and mill sites and property acquired as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same." [Finding XVII, p. 481, fols. 1168-9.]

Considering the fact that he did not claim that

they were of any special value to himself and neither asked that the corporation pay him any increase on the purchase price he had paid, or any compensation for his time or services, we think it reasonable to suppose he at that time either had an eye single to the interests of the corporation, even as against himself, or, which is less probable, was trying to give those interested in the corporation, that impression.

"At all times after July 15th, 1901, the Silver Bell Copper Company continued as it had since November, 1900, to possess, work and use and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company." [Finding XVII, p. 485, fol. 1176.]

All the money, time and labor put upon and into those mines, by which their value taken by themselves, was raised from comparatively nothing, when Steinfeld bought in their titles, to whatever their value was at the time of the sale to the Imperial Copper Company, and which Steinfeld, by the corporate action of January 16, 1904, hereinafter discussed, claimed was more than \$250,000.00, was put upon and into the mines by the Silver Bell Copper Company. The original discovery that they had ore of any value was made by the expenditure of the Silver Bell Copper Company's money in working in the lower levels

of the Mammoth mine, and more, it was Steinfeld using the mine and largely the money given to him to use by two of the stockholders of the Silver Bell Copper Company, to whom he was bound by the closest ties of confidence and trust, who directed the operations of the Silver Bell Copper Company, and caused this money of the corporation to be used in developing mines he now claims were always his.

As hereinabove shown, on April 3, 1903, Steinfeld, by letter, gave G. A. Beaton or his nominee, an option to purchase for an entire price of \$515,000.00 all of said properties as one entire property, including all mines and property "standing in the name of" J. N. Curtis, Albert Steinfeld, and the Mammoth Copper Company and the Silver Bell Copper Company. On May 13th, 1903, Steinfeld formally reported his action in this respect to the board of directors of the Silver Bell Copper Company, and at his request, his action was confirmed, there being no suggestion that the Silver Bell Copper Company was not to receive the entire purchase price. Steinfeld conducted all the negotiations, and on May 20th, 1903, consummated the sale. The Imperial Copper Company was Beaton's nominee. All deeds and necessary documents were executed by the Silver Bell Company's officers, the Mammoth Copper Company, and Steinfeld, all under Steinfeld's directions, and delivered in escrow for and to the

Imperial Copper Company and an agreement guaranteeing to the Imperial Copper Company the titles to the properties for a certain definite time was executed on the demand of the latter by the Silver Bell Company and Steinfeld. At the same time the Imperial Copper Company paid and delivered to Steinfeld, as treasurer of the Silver Bell Copper Company, \$115,000.00 in cash and four notes for \$100,000.00 each with interest payable to the Silver Bell Copper Company in 3, 6, 9 and 12 months respectively. Thereafter, the Silver Bell Copper Company, as party of the first part, the Mammoth Copper Company, as party of the second part, and Steinfeld as party of the third part, executed an agreement known as the "Guarantee Agreement," dated May 20th, 1903, and set forth in full, in the statement of the case hereinabove. [Findings XX to XXV, pp. 486-9, fols. 1178-85.] After the completion of the transaction on May 20th, 1903, the board of directors of the Silver Bell Company met for the purpose of ratifying, as they always did, what had been done by Steinfeld. According to the minutes, President Curtis reported in detail the sale and its terms, and the execution and delivery of the papers, and the payment to Steinfeld as treasurer of the Silver Bell Company of the \$115,000.00 in cash and the delivery to him as such treasurer of the said four \$100,000.00 notes. He then further reported that Steinfeld had again submitted for

acceptance, the proposition of July 15, 1901, with the modifications that the Silver Bell Copper Company pay him forthwith the sums he had expended in acquiring the "English group" of mines, and the 300 shares of Nielsen stock and the Nielsen-Lewis mines, with interest, which all then amounted to \$18,117.00; assume all Steinfeld's obligations under and pay all costs and expenses incurred by Steinfeld in making the sale to the Imperial Copper Company and arising out of the said or any past negotiations or transactions in regard to the "English group" of mines [finding XXVII, pp. 489-92, fols. 1186-91], and that the Silver Bell Copper Company "shall indemnify him against loss, damage, or expense by reason of his having guaranteed the titles to the mining claims sold, or agreed to be sold, to said Imperial Copper Company, as is set forth in the "Guarantee Agreement" (to the Imperial Copper Company) "heretofore submitted to this meeting."

"The president also stated that it was necessary to adjust with the Mammoth Copper Company the disposition that was to be made of the purchase money upon the sale. He then submitted the agreement between this company, the said Mammoth Copper Company, and Albert Steinfeld on this point and also covering the matter of the guarantee" [finding XXVII, p. 491, fol. 1189] this last agreement being the "Guarantee Agree-

ment" of May 20th, 1903, set forth in full in the statement of the case hereinabove, and is to be distinguished from the guarantee agreement to the Imperial Copper Company above referred to.

At this time, we wish to call this Honorable Court's attention to the fact that this "Guarantee Agreement" of May 20th, 1903, was not one of the conditions of the proposition of July 15, 1901, nor was it strictly, on May 20th, 1903, made one of the additional conditions to that proposition. It was the method selected by Steinfeld and the board of directors controlled by Steinfeld for satisfying the condition that Steinfeld should be protected against liability for his personal obligations and guarantees, and we also wish to call this Honorable Court's attention to the fact that this "Guarantee Agreement" was not only not intended to be the document evidencing the transfer by Steinfeld and the Mammoth Copper Company to the Silver Bell Copper Company of all claims of the two former, against the Silver Bell Copper Company, or of any transfer of interest or the title by the two former to the latter in the "English group" of mines, and the Nielsen stock, but on the contrary it was but a method selected, as aforesaid, to satisfy one of the considerations demanded by Steinfeld of the Silver Bell Copper Company under the proposition of July 15, 1901, as modified by him May 20th, 1903, and by their

language as recorded in the minutes was so understood by the directors.

This matter is of great moment to plaintiff because of the decision of the Supreme Court on the first appeal which, in effect, held that this "Guarantee Agreement" was the record and the only record of any transfer by Steinfeld and the Mammoth Copper Company of any interests by them to the Silver Bell Copper Company (Steinfeld v. Zeckendorf (Ariz.), 86 Pac., p. 7). After the president of the corporation had, as aforesaid, on May 20th, 1903, reported to the board of directors, a number of resolutions were passed ratifying and confirming what had been done, as reported by the president, accepting Steinfeld's proposition of July 15th, as modified, ordering that Steinfeld be forthwith paid \$18,117.00; that Steinfeld retain as treasurer, sufficient money to satisfy all claims due under the Neilsen and Francis-Volkert contract; that Steinfeld, treasurer, pay and discharge the claim of N. O. Murphy for a commission on the sale, and

"Resolved that the president and secretary of this corporation be, and they hereby are, authorized, empowered, and directed, in such manner and form as they deem necessary or proper to indemnify said Steinfeld against all loss, damage, and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold or agreed to be sold to the Imperial Copper

Company; and that he and they are hereby authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents or other writings which they deem necessary in the premises."

"Resolved, that the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company and indemnifying said Steinfeld, be and the same is, hereby ratified, approved, and confirmed." [Finding XXVII, pp. 491-2, fols. 1190-1.]

By these resolutions, the directors (and the directors at this time were dominated by Steinfeld) did not consider the "Guarantee Agreement" even a part of the consideration, as aforesaid, passing to Steinfeld, but we admit, in fairness, it was so intended.

The "Guarantee Agreement" itself, does not purport to pass any title to any one of anything, but the document did evidence an agreement under which the right to a physical possession of the proceeds of the sale to the Imperial Copper Company, was agreed upon, viz:

"WHEREAS, the parties hereto desire to settle and determine between themselves what disposition shall be made of the proceeds of said sale; and * * * NOW THEREFORE, in consideration of the

premises and the sum of one dollar (\$1.00) * * * it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong and be the property of the Silver Bell Copper Company. And it is further agreed that the four promissory notes of \$100,000 each * * * as well as the proceeds of said notes when collected, shall be paid by (to) the said Albert Steinfeld, as aforesaid, and as security for an indemnity against loss, damage, or expense, which may arise to him for or out of or by reason of any of the obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever." [Finding XXV, pp. 488-9, fols. 1183-4.]

An examination of this agreement will show that it is even more crude than the rest of the records and documents made or executed by the Silver Bell Copper Company. The title and the custody of the proceeds of the sale to the Imperial Copper Company were the most important things to the Silver Bell Copper Company, but neither this document nor any other executed at the time, shows that Steinfeld ever transferred any title to the "English group" of mines or the proceeds thereof to the Silver Bell Copper Company, and the only reference thereto is as aforesaid, in the minutes of the corporation. We think, however, that the plain intent of the agreement, was to evidence the delivery to Steinfeld, of the money and

notes received on the sale to the Imperial Copper Company, to be held by him as security on the guarantee which he had executed to the Imperial Copper Company with the Silver Bell Copper Company, and that, notwithstanding Steinfeld's physical possession thereof, it was nevertheless the property of the Silver Bell Copper Company. Said document does not even prescribe a time in which said Steinfeld should return or could be compelled to return the money to the said Silver Bell Copper Company, nor does it prescribe any method by which the large indebtedness of the Silver Bell Copper Company could be paid by Steinfeld, as aforesaid. Steinfeld was evidently acting with an eye single to his own benefit and giving to the corporation only an acknowledgment that the one-half million dollars of its property which it agreed to allow him to hold, as trustee, and use for his personal purposes without security for an indefinite period, was really its property.

There is no reason for giving the minutes of the corporation any more favorable interpretation towards Steinfeld's interests than the plain meaning of the language used, for these records were of Steinfeld's own making.

Curtis was president and Shelton was secretary of the corporation, and had been so from its organization. As such officers they signed all the papers above referred to, that had been executed

and delivered on behalf of the Silver Bell Copper Company, including the Steinfeld guarantee agreement, but Steinfeld, as above shown, had conducted all the negotiations and, though the minutes of the meeting made the "president" report, instead of Steinfeld.

Notwithstanding that the fiction of the "option" of July 15th, 1901, was still kept up, it cannot be doubted that Steinfeld, either through believing Franklin's advice or otherwise, on May 20th, 1903, still thought himself a trustee. It is incredible otherwise that he should then have made no claim to what he afterwards alleged was the large value of "English group" of mines, or to the profits the Silver Bell Copper Company had made from working the ores of the said "English group," as alleged in the defendants-appellants answer. [Trans. of Rec. p. 359, fol. 862, and page 365, fols. 878-9.]

If Steinfeld had called the stockholders' meeting and it had taken no action and no equities existed, then, after September, 1902, the corporation had no rights, under the language of the said "option." But so little was any interest of the Mammoth Copper Company and Steinfeld in the "English group" of mines considered as affecting the Silver Bell Copper Company's title, that the directors on May 20th, 1903, even forgot the option had been extended from October 15th, 1901,

to September 15th, 1902. [Finding XXVII, p. 490, fols. 1187-8.]

Shelton, as has been shown, had actually no interest in the corporation or any of the proceeds of the sale of this property. Curtis holding 170 shares and not being a lawyer was undoubtedly satisfied with any record made which assured him of getting his share of the assets of the corporation and this fiction of the "option" given by Steinfeld in his proposition of July 15th, 1901, was apparently as good as any other that could be adopted, besides Curtis was absolutely powerless to oppose Steinfeld. He recognized the obligations he was under to Steinfeld, and with the exception of the opportunity given Steinfeld to abuse his power in the control of the money and notes of the corporation, there was nothing in the transactions of the corporation up to May 20th, 1903, that apparently injuriously affected the interests of any of the stockholders except Nielsen, while on the contrary, through Steinfeld, an enterprise that cost Curtis nothing, had, through the financial assistance obtained through Steinfeld, managing partner of L. Zeckendorf & Co. and, by Steinfeld's business ability, been sold at a profit netting him, Curtis, about \$100,000.00 on his shares of stock, after paying all of the corporation's debts and liabilities. Had Steinfeld's arbitrary powers in relation to the affairs of the corporation never been put to worse use after

May 20th, 1903, than they had previous to that time, no one of its stockholders other than Nielsen would have had much cause for complaint.

The practical effect of the action of the board of directors, on May 20th, 1903, was the acceptance and full performance on their part of such proposition as Steinfeld had the right to make on July 15th, 1901. If, at any time, Steinfeld was a trustee of the Silver Bell Copper Company in the holding of the Nielsen shares of stock and the "English group" of mines, then the company owed him a sum, with interest, amounting to \$18,117.00, and was required to assume certain of his liabilities. The payment of the \$18,117.00 and the assumption by the corporation of his liabilities under his contract with Nielsen and with the Francis-Volkert claimants, satisfied the conditions of the trust and vested absolutely the title to these properties or their proceeds, in the Silver Bell Copper Company. On the other hand, if Steinfeld was not originally such a trustee for the Silver Bell Copper Company, then the original conditions of the proposition of July 15th, 1901, were all satisfied before Steinfeld had claimed a forfeiture. Being in control of the stockholders and directors, he could not even claim a forfeiture till he had caused a stockholders' meeting to be called and held for the purpose of accepting or rejecting the proposition, which was never done. On July 15th, 1901, Steinfeld

admittedly believed he held the properties in trust for the Silver Bell Copper Company. [Allegations of answer, pp. 353-5, fols. 845-9.] There is nothing to indicate that his belief in this respect was changed on May 20th, 1903, but, on the contrary, "at all times after July 15th, 1901, the Silver Bell Copper Company continued, as it had since November, 1900, to possess, work and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company." [Finding XVII, p. 399, fol. 969.] Therefore, what was done on May 20th, 1903, was done in the belief by all parties that the properties belonged to the Silver Bell Copper Company, and that the company owed Steinfeld \$18,117.00 and was obligated to assume his liabilities stated in the proposition of July 15th, 1901. No one could have thought that Steinfeld had the right to impose the condition on the company, that all the proceeds of the sale to the Imperial Copper Company should be turned, as security for his guarantee to the said company, over to him, or the company would forfeit its right to the proceeds of the property held in trust by Steinfeld. They undoubtedly could have thought nothing more than that it was fair to Steinfeld that he should be so secured. They cannot be credited with intending to do things they never

thought of doing. The minutes of the meeting recite:

"The president also stated that it was necessary to adjust with the Mammoth Copper Company the disposition that was to be made of the purchase money upon the sale. He then submitted the agreement between this company, the said Mammoth Copper Company and Albert Steinfeld on this point and also covering the matter of guarantee." [Finding XXVII, p. 405, fols. 985-6.]

This agreement does not purport to be a transfer or sale of property or the proceeds of property by Albert Steinfeld or the Mammoth Copper Company to the Silver Bell Copper Company, but it does agree "that the purchase price paid and to be paid upon the said sale shall belong to and be the property of the said Silver Bell Copper Company." [Finding XXXIII, pp. 416-17, fols. 1016-19.] It is an acknowledgment in writing signed by Steinfeld and the Mammoth Copper Company, that the proceeds of the sale of the properties belonged to the Silver Bell Copper Company. It does not condition the acknowledgment or agreement upon the performance by the Silver Bell Copper Company of any of the conditions of the July 15th, 1901, proposition, or in any way refer to it. It shows it was executed solely to witness the fact that the proceeds of the sale belonged to the Silver Bell Copper Company,

and that Steinfeld should hold the proceeds of the sale as security for his guarantee to the Imperial Copper Company and responsibility on commissions that might be claimed on said sale.

Giving the entire transaction the most favorable view to Steinfeld, it is plain that, believing that Steinfeld, in his own name and in the name of the Mammoth Copper Company, held the title to the English mines and the 300 shares of the Silver Bell Company in trust for the latter company, Steinfeld and the directors intended to take such action and execute such documents as was necessary to fix the title to the proceeds of the sale in the Silver Bell Copper Company, while giving their physical possession to Steinfeld as security for his guarantee.

The retention of the proceeds of the sale by Steinfeld, as security for his guarantee to the Imperial Copper Company, was no part of the original proposition of July 15th, 1901, and could not be made a condition of said proposition of July 15th, 1901, except by the action of the corporation, for the reason that it was clearly detrimental to the interests of the corporation and the directors of the corporation were controlled and directed in their action by Steinfeld. It may be contended that Steinfeld's guarantee was a part of the consideration given by the Imperial Copper Company and that the sale could not be consummated without such guarantee, but whether or

not that is true, it cannot affect the question for the reason that the sale to the Imperial Copper Company was a sale of all the property of the company and the board of directors had no power to make such a sale without their action being authorized or ratified by the stockholders of the corporation.

Clark & Marshall, Private Corp. Vol. 1,
pp. 436-9.

And by the weight of authority it would seem that this could not be done over the dissent of a single stockholder. Therefore, Steinfeld had no right, through his board of directors, to impose this condition upon the Silver Bell Copper Company in the absence of a showing that his action in so doing had been authorized or approved and ratified at a meeting of the stockholders. After this sale to the Imperial Copper Company and in October and November of 1903, Steinfeld as treasurer of the Silver Bell Copper Company, in addition to the \$115,000 cash, received \$101,500 and \$102,987.50, in payment respectively of the first two notes due by the Imperial Copper Company. [Finding XXX, p. 407, fol. 991.] In October and November of 1903, he sent practically all the money and notes, which he held as such treasurer, to the California Bank in San Francisco, California, and deposited the same in his individual name. Plaintiff-appellant being dis-

satisfied, for reasons not fully set forth in the findings, brought a stockholders' suit in said city of San Francisco, California, against Steinfeld and said bank, and enjoined Steinfeld from receiving and the said bank from delivering to him, said money or notes. The complaint in said action is exhibit "J" [pp. 251-5, fols. 605-13] and made a part of finding XXVIII, page 406, fol. 989. The plain intent of the suit, as shown by the allegations of the complaint, was to require Steinfeld to return the custody of the money and notes to the Silver Bell Copper Company, and to rescind that resolution of the Silver Bell Copper Company, which authorized Steinfeld's action in retaining the money individually, instead of as treasurer of the corporation.

Subsequent to the bringing of this suit and on December 26th, 1903, a meeting of the stockholders of the Silver Bell Copper Company was held at Tucson, Pima county, Arizona territory, at which were present Albert Steinfeld, R. K. Shelton, J. N. Curtis, Louis Zeckendorf, Eugene S. Ives, attorney for and representing Steinfeld, and William H. Barnes representing and attorney for Louis Zeckendorf. The minutes of this meeting are too lengthy to incorporate in this argument, being a stenographic report of everything that was said and done at the meeting. They are set forth at length in finding XXXII, pp. 407-16, fols. 992-1015. The plain intent of all parties at

this stockholders' meeting, however, was the restoration of the *custody* of the money and notes by Albert Steinfeld, the individual, to the treasurer of the Silver Bell Copper Company, and the rescission of the resolution of the directors, which gave that custody to Steinfeld, with a view and for the purpose, on the part of Steinfeld, to induce Zeckendorf to dismiss his suit brought in San Francisco, as aforesaid, Mr. Ives, attorney for Steinfeld, in the discussion which preceded the meeting, stated that Steinfeld had resigned his office as treasurer of the company, had turned over to Curtis, the president, all the money which he had of the corporation, except a certain \$51,500.00, which had been garnisheed in Steinfeld's hands, in a suit by said Franklin against said Silver Bell Copper Company.

He also stated that Steinfeld had given to Curtis an order upon the Bank of California for the money and notes there deposited. [Finding XXXII, p. 409, fol. 995, and p. 411, fol. 1001.] Mr. Ives further stated that Mr. Steinfeld had rendered the account demanded of him in the San Francisco suit. This account was the same one subsequently submitted to the board of directors of the corporation, which we will hereafter discuss. [Finding XXXII, p. 415, fol. 1013, and p. 420, fol. 1026.] Mr. Ives further stated in detail that Steinfeld had complied with all the demands made in the San Francisco suit and called upon

Zeckendorf to dismiss the suit. At this time and for purposes of the present argument and argument hereinafter, we will call the court's attention to the following language of Mr. Ives, spoken on behalf of Mr. Steinfeld:

"Now we want these suits disposed of. I am talking frankly in that matter, and until disposed of, Mr. Steinfeld is unwilling to agree to anything. He thinks his business integrity has been impugned, and he wants them disposed of. Now we want to meet you as far as we can. We will never be willing to admit that Mr. Steinfeld had the possession of these moneys wrongfully. We maintain now, as we maintained then, that he had them by virtue of the agreement that was executed in pursuance of a resolution of the board of directors which he claims, and we believe, was a valid resolution and valid agreement." [Finding XXXII, p. 494, fols. 1194-5.]

It will be noticed in this language that Mr. Steinfeld does not claim any right to the money except that right given to him by the resolution and agreement referred to. He did not claim at any time in the stockholders' meeting that he had any other right, title or interest in the money or notes other than that of the *personal custody* AS SECURITY, of them under the said "guarantee agreement" and resolution. At this meeting a resolution was passed by the stockholders in the following language:

“Resolved that the agreement executed on May 20th, by the president and secretary of the corporation, with the Mammoth Copper Company, with Albert Steinfeld, a copy of which is hereto annexed, be and the same is, hereby rescinded and that the said agreement and resolution passed on said date be declared null and void.”

The agreement referred to was the said “guarantee agreement” and the resolution. [Finding XXXII, p. 409, fol. 997, p. 411, fol. 1000.] At this point we call this court’s attention to the fact that the word “resolution” is in the singular; that a number of resolutions were passed at the directors’ meeting on May 20th, 1903, and that the resolution evidently intended to be rescinded was only the one authorizing the signing of the indemnity agreement. [Finding XXVII, p. 406, fol. 988.] After the passage of this “rescission” resolution, which is claimed by the defendant-appellant to have had the effect of divesting the Silver Bell Copper Company of the *title* to the proceeds of the sale of the “English group” of mines, there was a general discussion with regard to what was to be done with the money and notes of the corporation, Mr. Zeckendorf’s attorney insisting upon dividing it; that Steinfeld’s guarantee to the Imperial Copper Company was of but little moment, and but little liability could fall upon him and that a large part of the money should be divided amongst the stockholders in the

way of dividends, after first paying Mrs. Francis the \$12,000, and Mrs. Nielsen the amount due her upon the contracts under which the "English group" of mines and the Nielsen stock were purchased. [Finding XXXII, pp. 412-13, fols. 1004-8.] Judge Barnes, on behalf of Mr. Zeckendorf, reviewed the different obligations that the company had to meet from this money and these notes, being principally the debts due on the purchase of the "English group" of mines and the 300 shares of stock, and no suggestion was made by any one to the effect that Mr. Steinfeld would now have to meet these obligations or had any claim whatsoever against these funds, but on the contrary, Mr. Ives again called upon Mr. Curtis for the confirmation of his statement that Mr. Steinfeld had turned over all the cash and had given him an order upon the Bank of California for it to deliver him all the cash and notes *of the company*. Mr. Curtis declared he had received these things from Mr. Steinfeld and would deposit them to the Silver Bell Copper Company's order. [Finding XXXII, pp. 414-15, fols. 1009-12.] It is apparent from the reading of the discussions and minutes of this meeting, which were taken down stenographically, and were incorporated at length in said finding XXXII, that at that time Steinfeld neither claimed, nor intimated that he would claim, that he had any other interest in said funds or notes than that of a stockholder of

said corporation, and in the account which he had prepared and submitted to the stockholders' meeting and submitted to the directors' meeting held immediately thereafter, he credited himself as treasurer with the payment to himself as the individual, of \$18,117, due him for the sums of money expended by him together with interest, in acquiring the "English group" of mines and the Neilsen stock. The Territorial Court found:

"That in the stockholders' meeting, held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that date by the stockholders of the Silver Bell Copper Company, would operate to give either Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of sale, nor did the directors in good faith, understand or believe that the stockholders intended to instruct them to rescind any part of the agreement and resolution, other than that relating to the indemnity agreement mentioned." [Finding XXXII, p. 416, fols. 1014-15.]

The Supreme Court of the territory, in rendering its decision upon the first appeal to it of the case, held that it was immaterial what was the intention of the stockholders in rescinding this agreement; that the rescission rescinded the en-

tire document and not a part of it; it further held, in effect, that it was through this document that the Silver Bell Copper Company became the owner of this money and these notes, the proceeds of the sale to the Imperial Copper Company, unless Steinfeld had purchased and held the "English group" of mines and the Nielsen shares of stock, as aforesaid, in trust for the Silver Bell Copper Company. It then sent the case back to the lower court for finding upon the question of the trusteeship. (Steinfeld, *et al.* v. Zeckendorf (Ariz.), 86 Pac. Rep. p. 7.) With all due respect to the Supreme Court of the territory of Arizona, we believe and have urged and will urge that the agreement of May 20th, 1903, referred to by the court, was never intended to be the agreement or evidence of the agreement by which the Silver Bell Copper Company acquired title to the proceeds of the sale of the "English group" of mines; that the resolution considered by the stockholders for the purposes of rescission, was the resolution, and that only, which gave the possession of the money and notes to Steinfeld individually; that the action of the stockholders could not and did not rescind anything except what it was the intention of the stockholders, Steinfeld included, to rescind and that no subsequent action of the directors based upon the action of the stockholders was authorized, which did anything more, or went any further than was intended by the stockholders at the

said stockholders' meeting; in other words, that the stockholders having no reason to believe that the agreement of May 20th, 1903, conveyed or was intended to convey any title from Steinfeld to the Silver Bell Copper Company, gave no authority to the directors to take any action which would pass the title to the money and notes, the proceeds of the sale of the Imperial Copper Company, to Steinfeld and from the Silver Bell Copper Company.

It will be observed that the only language in the agreement of May 20th, 1903, which might be construed into a transfer or assignment by Steinfeld to the Silver Bell Copper Company, is the following:

"Now, therefore, in consideration of the premises and the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon said sale shall belong to and be the property of the Silver Bell Copper Company."

The consideration expressed in this agreement is one dollar (\$1.00) and not the \$18,117 which was paid to Steinfeld for such equity as he had in the English mines and Nielsen stock. There is no evidence or finding to show that the one dollar (\$1.00) and the custody of the money and notes for the purpose of securing Steinfeld against his guarantee to the Imperial Copper Company, were

not the true and only considerations of said agreement. The utmost that this document can evidence in that regard is that the Silver Bell Copper Company, the Mammoth Copper Company, and Albert Steinfeld each paid to the other one dollar (\$1.00) and agreed to give Steinfeld the custody of the money and notes to secure him upon his said guarantee for this acknowledgment on the part of Steinfeld and the Mammoth Copper Company that they had no claims or interest in the proceeds of the sale of the "English group" of mines. The stockholders knew by Steinfeld's account that he had been paid \$18,117 in settlement of all claims he and the Mammoth Copper Company had against the Silver Bell Copper Company, for the acquisition by the Silver Bell Copper Company of the "English group" of mines and the Nielsen stock; and the stockholders never authorized the directors to repay to Steinfeld the \$18,117. The Silver Bell Copper Company by Steinfeld, its treasurer, had possession of all the said money and notes, the proceeds of sale to the Imperial Copper Company, and it delivered possession to Steinfeld, the individual, as trustee, as security for his guarantee, aforesaid; that possession was returned by Steinfeld to the Silver Bell Copper Company before the stockholders' meeting. The only ratification of the sale to the Imperial Copper Company, made by the stockholders, is the inference drawn from their meet-

ing that they did not disapprove of the sale, or of any of the things which took place on May 20th, 1903, except in one particular, and that was the one condition imposed by Steinfeld that he should have the personal custody of the money and notes as security. In other words, the stockholders of the Silver Bell Copper Company ratified the sale made by their directors upon the theory and in the belief that the Silver Bell Copper Company was to receive \$515,000.00 for its property, less \$18,117, due Steinfeld, and certain commissions due others. Had Steinfeld represented to the stockholders then, that the true purchase price the Silver Bell Copper Company was to receive upon the sale of its property by Steinfeld's board of directors, was only about one-half of \$515,000.00, there is no question but that the stockholders would have disaffirmed the sale which could only be made valid by their ratification, as hereinabove shown. The fact that Steinfeld, Shelton, and Curtis led the stockholders' meeting to believe that practically all of this \$515,000.00 had gone to the Silver Bell Copper Company, as its property, should in justice and equity, have estopped Steinfeld from afterward claiming that he individually, was the half owner of the proceeds of the sale.

If, as found by the lower court, and which finding was expressly approved and adopted by the Supreme Court of Arizona and considered by it in

rendering its first decision, the stockholders of this corporation, without meaning to do so, could have given its property to one of its stockholders, who did not himself at the time the action was taken, "in good faith, understand or believe" that the stockholders, including himself, so intended, then the meshes of the law are intricate and unfit for the conduct of ordinary business affairs. It is only by the strained construction put upon the agreement of May 20th, 1903, by the Supreme Court of the territory, that this condition of affairs could be made possible. If the language of the agreement of May 20th, 1903, was clear and there was no doubt as to the intention with which it was used and the extent, there might be a reason for holding that a court of equity could not relieve as against the unintentional results of the action of the stockholders as construed by the Supreme Court of the territory, but the language of this agreement is at the best, ambiguous in regard to the question of conveying title to the said money and notes, and it is unquestionably the duty of a court of equity to ascertain, if possible, what was meant by it.

The language used in the minutes of the corporation shows that the strongest claim Steinfeld could make under them, was that the agreement of May 20th, 1903, was not the agreement which passed or was intended to pass title from Steinfeld to the Silver Bell Copper Company, but was

executed to evidence what was but a part of the consideration for the agreement under which title passed from Steinfeld to the Silver Bell Copper Company.

The other considerations for this agreement of July 15th, 1901, to Steinfeld, such as doing of assessment work on the mines, the payment of \$18,117, and the assuming of Steinfeld's obligations under the contract with Nielsen and Francis-Volkert, were in effect settled and discharged by the corporation, and it seems to us that a reading of the proceedings of the said meeting of the stockholders of December 26th, 1903, will show conclusively that Steinfeld waived and relinquished all right to the additional consideration which he had demanded on May 25, 1903, viz: the custody of the said notes and money as additional security to him upon the guarantee made by himself, the Mammoth Copper Company and the Silver Bell Copper Company to the Imperial Copper Company. It is impossible to reconcile the finding of the court that Steinfeld, as well as the other stockholders of the corporation, "did not understand or know or believe" that he, Steinfeld, was taking such action as would revest him with the title to this money, with the conclusion arrived at by the court, that against Steinfeld's understanding, knowledge, and belief, therefore against his intention, the relinquishment by him, of a portion of the consideration for his transfer

of his rights to the Silver Bell Copper Company by a mere resolution of rescission, would, of necessity, and as a result of law, divest the corporation of its property and invest Steinfeld with it; in other words, would deprive Steinfeld of the right of accepting as a consideration for the transfer by him to the corporation, a less consideration than he had originally agreed upon. And it is equally startling to find it declared to be the law that after a corporation had expended untold thousands of dollars in doing assessment work and developing a mining property, as a part of the consideration for acquiring a mining property, it would, as a matter of law, be deprived of all right, title, and interest in the property and all money it had expended in doing the assessment work and development work thereon, by operation of law and against the intention of all parties interested, and that by an act only of mere rescission.

The Supreme Court of the territory, in its decision on the first appeal, held that by voting to rescind this contract of May 20th, 1903, the corporation rescinded and annulled all the agreements and contracts which formed practically all the conditions of the sale to the Imperial Copper Company, and the settlement of the accounts, contracts, and agreements entered into by Steinfeld, and the Silver Bell Copper Company and the Mammoth Copper Company, and yet the "Guar-

antee Agreement" of May 20th, 1903, does not even refer to many of the most important considerations and conditions as shown by the directors' meeting of May 20th, 1903, which entered into the transaction by which the Silver Bell Copper Company received title (if it did) from Steinfeld and the Mammoth Copper Company, while the agreement of May 20th, 1903, executed by Steinfeld, affirms only that the object of said agreement is a "desire to settle and determine between themselves what disposition shall be made of the proceeds of said sale."

Again the agreement was between the Silver Bell Copper Company, party of the first part, the Mammoth Copper Company, the party of the second part, and Albert Steinfeld, the party of the third part, and as it is customary to make the party giving or relinquishing a right the party of the first part, this arrangement of parties persuasively corroborates our contention.

If we adopt as strict a construction of the law as was adopted by the Supreme Court of the territory, then the utmost that can be contended as evidenced by the "Guarantee Agreement" of May 20th, 1903, is a desire to settle and determine between themselves, what disposition shall be made of the proceeds of the said sale under which the properties which had already been sold by Steinfeld and the Mammoth Copper Company to the Silver Bell Copper Company, and which, together

with other property of the Silver Bell Copper Company had been sold to the Imperial Copper Company, and an agreement that Steinfeld should have the custody of the money and notes received as the proceeds of the sale to the Imperial Copper Company. A rescission of this agreement would deprive Steinfeld of the custody of the money and notes and would leave unsettled and undetermined what disposition should be made of the proceeds of the sale to the Imperial Copper Company, but it would not reach to and affect the other conditions of the sale by Steinfeld and the Mammoth Copper Company to the Silver Bell Copper Company, they would still be unadjusted and, if Steinfeld and the Mammoth Copper Company (who was Steinfeld under another name), had decided to accept the consideration already paid him by the Silver Bell Copper Company for the "English group" of mines, he most assuredly had the right to do so, and when he voted as a stockholder for the rescission of the May 20th, 1903, agreement, without any thought, knowledge, or intention that it would in any way invalidate or rescind his sale of the "English group" of mines to the Silver Bell Copper Company, he unquestionably ratified the conditions of the sale by himself and the Mammoth Copper Company to the Imperial Copper Company for the considerations already given him less the cus-

tody of the money, which was the only consideration he had not then received.

On December 26th, after the meeting of the stockholders, a special meeting of the board of directors of the Silver Bell Copper Company was held with Steinfeld, Curtis, and Shelton present. The territorial courts found, as hereinbefore pointed out, that at this time, Curtis and Shelton, as directors, voted for those things only that Steinfeld directed them to, therefore at this date, the entire board of directors was doing what Steinfeld directed them to do. Not satisfied with that, Steinfeld had Eugene S. Ives, his attorney, appear at said meeting and had the said board of directors, at the request of Ives, declare Steinfeld's good faith in all that he had done for the corporation, and the board of directors' good faith in their ratification of Steinfeld's action; condemn Zeckendorf for the hostile attitude which he is alleged to have assumed, recognize the fact that Steinfeld had transferred the possession of all the moneys and notes in his hands by delivering them, or giving orders for them to the corporation, recognize the fact that Steinfeld had tendered the said notes and funds of this company "together with a full and complete account of all moneys received and disbursed by him," and then pass resolutions repealing the resolutions of May 30th, 1903, and the agreement of the same date; authorize the president and treasurer to receive

from Steinfeld and the Bank of California all said funds and the said two notes of the Imperial Copper Company, which had not matured, and to execute an agreement with the Mammoth Copper Company and Steinfeld rescinding the said agreement of May 20th. No mention, however, is made of the \$18,117 heretofore paid Steinfeld, nor is any authority given to the treasurer to receive the said sum from Steinfeld, but, on the contrary, Steinfeld's account showing the payment to himself of this sum of money was, at said meeting thereafter audited and approved. [Finding XXXIII, pp. 416-20, fols. 1015-27.] The plaintiff knew nothing of this meeting or that it was going to be held until after January 21st, 1904. The court finds that in pursuance of the resolution and agreement of December 26th, 1903, Steinfeld paid to Curtis, treasurer of the Silver Bell Copper Company, the sum of \$18,117.00 after the meetings of the stockholders and directors above referred to [finding XXXIII, p. 420, fol. 1027] and that on January 9th, 1904, Steinfeld paid to Francis-Volkert the sum of \$12,700.00. [Finding XXXIV, p. 421, fol. 1028.]

On January 16th, 1904, Steinfeld, Curtis, and Shelton met as a board of directors, with Eugene S. Ives, Steinfeld's attorney, no one else having notice or knowledge of any such meeting and the board of directors, at the request of Ives and Steinfeld, "purported to adopt and pass a resolu-

tion," which recited, among other things, that Steinfeld and the Mammoth Copper Company owned part of the mines and properties sold to the Imperial Copper Company; that Steinfeld and the Mammoth Copper Company claimed that their part of these properties was greater in value than the property of the Silver Bell Copper Company, but offered to accept one-half of the purchase price paid by the Imperial Copper Company, and then authorized the payment to Steinfeld of \$145,743.75, and the delivery to him of one of the Imperial Copper Company notes in full consideration and discharge of his interests in the property sold to the Imperial Copper Company, and the court again finds, regarding this meeting, "that said Curtis and Shelton, in voting for the adoption of the said resolution, and said Curtis, in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no person whomsoever, except said Steinfeld and his attorney, Eugene S. Ives, and in so voting and acting, said Shelton and Curtis were under the complete dominion and control of said Steinfeld and voted and acted on his orders, and not otherwise." [Finding XXXV, pp. 421-22, fols. 1029-33.]

Under the finding made by the court heretofore referred to, neither the directors nor any of them in good faith, understood or believed that the stockholders at their meeting intended that they

should take such action, or intended to give them any authority to take such action [finding XXXII, p. 416, fols. 1014-15] and therefore the directors had no authority derived from the stockholders, to take this action. Stockholders, as such, have no implied power to rescind agreements made by the directors or officers of the corporation, for they are not agents of the corporation, and cannot make or rescind contracts for the corporation.

Clark & Marshall, Private Corp. Vol. 3, pp. 1905-6, par. 627 (b).

And the articles of incorporation expressly provide that these powers should be exercised by the board of directors [Ex. on page 214, fol. 517, made part of finding I]; therefore the utmost that can be contended for, on the part of the stockholders' meeting, is that it did not rescind any resolutions or agreement, but did authorize the directors to rescind a certain agreement and resolution. The intent of the stockholders being well known to the directors, as also the extent to which the stockholders intended the directors to go, the directors derived no power from the stockholders' meeting to go further than that intent, and unquestionably they had no power to make a present of the corporation's property to Steinfeld, even had they not been as they were, under Steinfeld's complete dominion and control. WE SUBMIT THAT THIS ACTION OF STEINFELD'S, KNOW-

ING THE INTENT OF THE STOCKHOLDERS, WAS ON THAT ACCOUNT, AS WELL AS MANY OTHERS, A FRAUD ON THE CORPORATION.

There is another view of the case that we wish to present and urge, viz: that Steinfeld on May 20th, 1903, and forever afterward, was estopped from claiming, either through himself or the Mammoth Copper Company, that he or the Mammoth Copper Company was the owner of any right, title, or interest in or to the "English group" of mines or the 300 shares of Nielsen stock, or the proceeds or dividends, or either thereof, for the following reasons: the circumstances under which Steinfeld, as aforesaid, acquired title to the "English group" of mines and the Nielsen stock were such that, if they did not, as we contend they did, make him an implied or constructive trustee, they at least caused the officers and directors and stockholders, other than Steinfeld, particularly this plaintiff, to believe that Steinfeld had purchased the said properties and all thereof, for the Silver Bell Copper Company. That after purchasing them, he delivered possession of them to the Silver Bell Copper Company.

"That at all times after July 15th, 1901, the Silver Bell Copper Company continued as it had since November, 1900, to possess, work, and use and do the assessment work on all of said properties as its own and as one property and with the

full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company." [Finding XVII, p. 485, fol. 1176.]

That under these circumstances the Silver Bell Copper Company expended large sums of money in the development of this "English group" of mines; that it, in fact, had originally discovered that there were large and valuable ore bodies in this "English group" of mines [finding VIII, p. 475, fols. 1154-55; finding IX, p. 209-10, fols. 623-30]. That by its work, expenditures of money and skill, the Silver Bell Copper Company gave a great value to this "English group" of mines, which it did not have and would not otherwise have had; that under the belief that it, the Silver Bell Copper Company, owned all of said "English group" of mines, it finally sold all of its property of every character and kind whatsoever, for, as it believed, the sum of \$515,000.00; whereas, had it known that Steinfeld and the Mammoth Copper Company would claim or could claim that it was not the owner of the "English group" of mines, it would never have consented to the sale of its property, except for a much larger sum of money; that the said Steinfeld, by his action at the time of the purchase of the "English group" of mines, and the Nielsen shares of stock, lulled the Silver Bell Copper Company into the belief that he was purchasing the properties for it and that he affirmatively and intentionally con-

tinued this belief of the Silver Bell Copper Company that it owned these properties, until long after the sale was consummated, as aforesaid, and until long after the Silver Bell Copper Company had a right to refuse to consent to the said sale and have its properties restored to it, for which reasons said Steinfeld, as aforesaid, estopped both himself and the Mammoth Copper Company from claiming any interest in the "English group" of mines or the Nielsen stock, or the proceeds or the dividends, or either thereof.

In the foregoing general discussion of the case, there are a number of points that have not and could not very well be given the careful consideration that they deserved, more especially as most of them need discussion in the light of the decisions of this Honorable Court and the courts of the states of the Union. Amongst these are

Steinfeld's Relations to L. Zeckendorf, L. Zeckendorf & Co. and the Silver Bell Copper Co.

The Silver Bell Copper Co. had as stockholders at the time it was organized, Carl Nielsen, 300 shares, J. N. Curtis 170 shares, Julia and William Zeckendorf 30 shares, R. K. Shelton 1 share, and L. Zeckendorf & Co., 499 shares. The 300 Nielsen shares were thereafter purchased for the Silver Bell Copper Co., Steinfeld taking and ever after holding them as trustee. [Trans. of Rec. finding II, p. 477, fols. 1158-9.] J. N. Curtis

ever after retained his 170 shares; Steinfeld took and thereafter held in his name as trustee, 30 shares belonging to William and Julia Zeckendorf; the one share standing in the name of R. K. Shelton belonged to L. Zeckendorf & Co. till June 6, 1903, when Steinfeld set it apart to himself and thereafter and on December 9, 1903, he presented it to said Shelton; the 499 shares were held in the name of L. Zeckendorf & Co. till June 6, 1903, when they were divided as follows; to L. Zeckendorf 250 shares, to Steinfeld 249 shares. [Trans. of Rec. finding II, pp. 469-70, fols. 1142-4.] No other changes have been made in the ownership of the stock so far as the findings show.

Therefore, the only stockholders of the Silver Bell Copper Co. ever had were Nielsen, Curtis, Shelton, William and Julia Zeckendorf, Steinfeld and L. Zeckendorf. The status of William and Julia Zeckendorf as stockholders, in so far as the findings show, never entered into this case, and therefore the only stockholders the corporation ever had who could be interested in this litigation, were the three directors, who held all the offices, Steinfeld, Curtis and Shelton, and the stockholder Louis Zeckendorf.

For about thirty years Steinfeld had been a partner and the general manager of the firm of L. Zeckendorf and Company and, as such, was in the actual and active control of its business. In

the year 1893 the articles of incorporation were amended, the ownership of Louis Zeckendorf in the assets of the firm being fixed at about 64 per cent, and the ownership of Albert Steinfeld at about 36 per cent. The profits, however, were to be divided 55 per cent to Louis Zeckendorf, and 45 per cent to Albert Steinfeld; and Steinfeld was to receive a salary of \$6,000.00 per year. Provision was made for the holding by either party in his name of property for the convenience of the firm. On August 7th, 1899, the articles were again amended; the business of the firm was limited to a general mercantile business at Tucson; the property and assets of the co-partnership was limited to such as then appeared on the co-partnership books, and to "such as may hereafter be acquired in the carrying on of said general mercantile business." As the partnership then owned mines and mining properties, a provision was made under which the interest of the co-partnership in such was limited to the amount that said mines and mining property owed on the books of the firm; provision was made for their sale in due course, whereupon the profits, whether in money or shares of stock, should be divided equally between the partners, share and share alike, and it was declared that such profits should not go into the business of the co-partnership, but should remain the individual property of each of the partners. On November 4th, 1901, it being apparent

that shares of stock and bonds of mining companies would be from time to time acquired in the carrying on of the business, another modification was made, including in these provisions shares of stock and bonds of mining companies, thereafter acquired, as well as those then owned. On June 13th, 1902, a further modification was made which provided that, if the sale of any mines, mining properties, mining stocks, or bonds owned by the co-partnership should not bring sufficient to settle the account charged against such properties on the firm books, that the deficit should be deemed a loss and should be borne by each of the parties to the co-partnership, share and share alike. [Trans. of Rec., pp. 433-40, fols. 1061-78, made part of Finding V, p. 472, fol. 1148.]

It will thus be seen that the business of the co-partnership was limited to a general mercantile business at Tucson, and that mining interests of any character including shares of stock acquired by the firm, should be held in trust to secure the payment of the amount due the firm, but as the individual property of the co-partners, share and share alike, and that if any loss occurred through such mining assets, the partners were to share the loss share and share alike. In other words, interests in mining properties and mining shares of stock were to be held by the firm in trust for a special partnership in which Zeckendorf and Steinfeld were equally liable for loss, and equally

shared the profits. These provisions were undoubtedly intended to prevent the firm of L. Zeckendorf and Company, as such, from doing or becoming interested in a mining business beyond the necessity of protecting such accounts as such mining interest owed the firm of L. Zeckendorf and Company. The necessary consequence of these facts was that, if an account or credit extended to a mining business should be converted into a mining venture, it would thereafter be held by the co-partnership, first, to protect the indebtedness which the mining business or venture owed to the firm, and, second, for the benefit of Steinfeld and Zeckendorf as equal partners who were thereafter to divide equally the profits of the mining business or venture amongst themselves, and to share the losses, if any, paying the amount due the firm of L. Zeckendorf and Company in equal proportions. On January 14th, 1899, Nielsen owed L. Zeckendorf and Company the sum of \$18,000.00; when, for the protection of this amount owing to the firm, the Nielsen Mining and Smelting Company was organized, and the latter company assumed and relieved Nielsen of the responsibility for its debt to the co-partnership, a large majority of its shares of stock was transferred to L. Zeckendorf and Company as additional security for this indebtedness and for Steinfeld and Zeckendorf's benefit. The indebtedness still remained charged against the company on

the firm's books, and subsequently, upon the sale of the property to the Imperial Copper Company, was fully discharged and satisfied. Therefore, the shares of stock were actually the property of Zeckendorf and Steinfeld, each owning an undivided one-half thereof, though the shares remained in the name of L. Zeckendorf and Company as security for the debt. Of this \$18,000.00, Zeckendorf's interest in the firm had advanced about 64 per cent, or \$12,000.00, and Steinfeld's interest about 34 per cent, or \$6,000.00, but they were each responsible to the firm for \$9,000.00 of it. Without any authority under the articles of co-partnership, Steinfeld thereafter, as manager of L. Zeckendorf and Company, financed the business and affairs of the Silver Bell Copper Company, and loaned it large amounts of money, and also sold it limited amounts of merchandise, until, at the time the mines were shut down to enable Steinfeld to purchase the "English Group" of mines, the Nielsen mines, and the Nielsen stock, the corporation owed the co-partnership a sum in excess of \$75,000.00. [Trans. of Rec., allegations of answer, p. 351, fols. 837-9.] Therefore, at that time Steinfeld was responsible to the co-partnership for more than \$37,500.00. So intimate were the relations between Steinfeld and Zeckendorf, that the fact that Steinfeld was using the money of the general mercantile business, two-thirds of which belonged to Zeckendorf, for

this purpose, was never questioned by Zeckendorf, though he had actually advanced about \$50,000.00, while Steinfeld had only advanced about \$25,000.00, but Steinfeld was actually responsible to Zeckendorf for \$12,500.00 more, which was one-half the difference between these amounts. Steinfeld's relations with Zeckendorf were, therefore, dual. First as managing partner of the general mercantile business of L. Zeckendorf and Company, it was his duty to take such steps as were necessary to protect the firm against the \$18,000.00 due to it. Second, as the special partner of Mr. Zeckendorf, it was his duty to take such steps as were necessary to protect their investment in this mining enterprise. At the time Steinfeld purchased the English mines, the Nielsen mines, and the 300 shares of stock, he, though an equal partner with Zeckendorf in this venture, having failed to put up at least \$12,500.00 that he should have put up to make his investment equal Zeckendorf's, was it not his duty personally to have advanced a very much larger sum of money than he paid for the English mines, the Nielsen mines, and the shares of stock, viz., about \$9,500.00, if money for this purpose was needed to protect the mining venture of Zeckendorf and himself?

Had Steinfeld performed this duty that he owed Zeckendorf, viz., advanced to the Silver Bell Copper Co. the \$12,500, and had he then per-

formed his duty to the corporation and held the stockholders' meeting that should have been called, to accept or reject the proposition or agreement of July 15, 1901 (at which meeting anyone could have acted as proxy for Mr. Zeckendorf if the latter was unable to be present) the questions involved in this case would never have arisen.

As both the stock of Zeckendorf and Steinfeld was then held in the name of L. Zeckendorf & Co., and Steinfeld was representing and voting it at all times, it was Steinfeld's duty to protect it and its interests, as fully as any other partnership property. The rule that prohibits Steinfeld, the partner, from purchasing the properties, the proceeds of which are involved in this litigation, for his own benefit and to the exclusion of his partner Zeckendorf, until Zeckendorf had had an opportunity, with knowledge of the facts, to join in or refuse to join in the purchase, has long since been recognized and referred to this court.

Kimberly v. Arns, 129 U. S. p. 512; Law Ed. Vol. 32, p. 764.

And assuredly, what Steinfeld could not do directly, equity will forbid him doing indirectly. The answer of defendants affirmatively sets up that the necessity for purchasing the property in controversy, was largely the necessity of protecting the firm of L. Zeckendorf & Co. for the amounts owed to it by the corporation. [Trans.

of Rec., p. 350, fols. 834-5.] But Steinfeld's duty was as much to protect the profits of the transaction as the losses. His blended duty to L. Zeckendorf, L. Zeckendorf & Co., and the Silver Bell Copper Co. made this possible only by his purchasing for the Copper Company the property, the proceeds of which are in controversy in this case.

The proposition or agreement of July 15, 1901, in the light of the evidence was an admission that Steinfeld held the property in controversy as the trustee of the Silver Bell Copper Co.

A short time before July 15, 1901, Curtis, the president and manager of the Silver Bell Copper Co., learned that Steinfeld claimed to be the owner of the English group of mines, and the 300 shares of stock purchased from Nielsen. Curtis contended that Steinfeld held the property in trust for the Silver Bell Copper Co. They consulted with S. M. Franklin, who was the attorney of the corporation, of L. Zeckendorf & Co., and of Albert Steinfeld. Franklin advised them that Steinfeld was such trustee. Steinfeld acquiesced in this position and asked Curtis to send him the corporation checks for interest on the amounts he had expended in the purchase. Curtis did so. Sometime later, Franklin advised Steinfeld "That because of his relations with the company, he had no legal right to make the purchases for his own benefit; but on the other hand, had no right to

compel the corporation to assume such purchases; that it was his duty to give to the company an opportunity, at a meeting of the stockholders, at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares, within a reasonable time to reimburse him for his outlays and to take over the property if it so desired; and that if the company should not avail itself of his offer, Steinfeld could then hold the properties as his own. After receiving this advice, Steinfeld returned the checks, for interest, to Curtis." [Trans. of Rec., Finding XV, pp. 478-9, fols. 1161-2.]

Defendants, in their answer, affirmatively allege that about the time the agreement or proposition of July 15, 1901, was executed, Steinfeld did "believe that, while he had purchased the said stock and the said bonds, with his own money, and for his own use and benefit, the said Franklin had correctly stated the law to him and that he therefore held the said stock and the said mines as trustee for said company." [Trans. of Rec. p. 354, fol. 847.] There can be no doubt, therefore, that at the time the July 15, 1901, document was executed, Steinfeld and the Copper Co.'s other officers and directors believed Steinfeld was such trustee. Such being the case, the July 15, 1901, document could not have been drawn to give the Copper Co. *new* rights in the purchased property. It was unquestionably drawn for Steinfeld's benefit, and to protect him.

It expressly provided for the execution to him by the Copper Co., of an agreement to the effect that the company would do the things Steinfeld was obligated to do, under his contracts of purchase, and would repay Steinfeld his expenditures in the matter, and then provided how he could be relieved from the trust.

"That in the event you fail to carry out your said agreement with me to do and pay for the annual assessment work upon said mining claims, or to make either said payment of \$12,500.00 or said payment of \$10,000.00 respectively, as above provided, or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute to me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay me, as aforesaid, and I am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims, and mill sites described in said deed to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatsoever, equitable or otherwise, thereto or therein." [Trans. of Rec., Finding XVII, p. 483, fols. 1172-3.]

The Arizona Supreme Court found, in relation to this document:

"That under date of July 15, 1901, in order to

bring the matter of the purchase of the properties hereinbefore referred to formally before the stockholders of the company for action, said Albert Steinfeld delivered to the secretary of said Silver Bell Copper Co., a document or proposal, dated of said date, in the words and figures following, viz:” [Trans. of Rec. Finding XVII, p. 479, fol. 1163.]

As before stated, Steinfeld claimed in this case, that he took his action in the matter influenced by and believing Franklin’s advice. The Arizona Supreme Court found, however, “But, in making and in presenting the said proposition, the said Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duties to the said company.” [Trans. of Rec., Finding XVII, p. 484, fol. 1174.] Therefore, believing, as a matter of fact, that he was such trustee, Steinfeld voluntarily and for the purpose of protecting himself, executed this document containing his admission that he was such trustee. For his further protection, he provided in the document that the Silver Bell Copper Co. should perform its part by Oct. 15, 1901. Steinfeld, in control of the officers, directors and stockholders of the corporation, twice caused the directors to resolve that a stockholders’ meeting be called to act in the matter, but not only did he fail to call or hold such stockholders’ meeting, but plaintiff-appellant, a large

stockholder, never heard of the July 15, 1901, agreement, "or of the facts concerning the purchase of said mine, properties or stock and of the prices paid therefor, or of the circumstances surrounding the same, till long after May 20, 1903, except that plaintiff knew that said Steinfeld had during the year 1899 and the early part of the year 1900, reported to plaintiff that the purchase of the same was desirable and should be accomplished, and that said Steinfeld intended, for the company, to acquire the same, and further, that when said Steinfeld returned from Europe, after concluding the purchase of the English title to said group of mines, he advised and told plaintiff that he had purchased the same." [Trans. of Rec., Finding XVIII, p. 485, fol. 1176.] The Arizona Supreme Court found:

"That at all times after July 15, 1901, the Silver Bell Copper Co. continued, as it had since November, 1900, to possess, work, and use, and do the assessment work on all said properties as its own and as one property, and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Co." [Trans. of Rev., Finding XVIII, p. 485, fol. 1176.]

Having voluntarily created the trust, Steinfeld could not without the consent of the corporation limit it either in time or otherwise, and controlling the officers and directors as he did, they could take no action to accept these limitations on the trust against the dissent of any stockholder.

Steinfeld was at all times a constructive trustee of the Silver Bell Copper Company in the ownership of the Nielsen stock and the English mines.

Steinfeld admitted in exact language in the July 15, 1901 agreement, that he held the Nielsen stock in trust for the Silver Bell Copper Co. [Trans. of Rec., Finding XVII, p. 481, fol. 1168 and p. 483, fol. 1173.]

The Supreme Court of Arizona has declared that:

“Whenever one person is placed in such a relation to another by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated.’ Bisphem says: ‘This rule not only applies to persons standing in fiduciary relation towards each other,—such as trustees, executors, attorneys and agents,—but also to those who accept any position out of which a similar duty ought, in equity and good morals, to arise.’”

Sun Dance Gold Mfg. Co., *et al.*, v. Frost,
(Ariz.) 64 Pac., 435.

This Honorable Court has declared:

“But whilst the patentee holds the legal title, his equitable relations to other parties are not thereby affected. That title, with important qualifications hereafter mentioned, is as much subject to control as the title

to land held by him, derived from private sources. If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon a showing of the fact in an appropriate proceeding, subject the lands to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it. Nor does it matter whether the party takes the title in his own name in good faith, under the belief that he can thereby better manage the property to the advantage of those for whom he is acting, or in compliance with their wishes, or whether from an intention to defraud them or their rights therein. In either case a court of equity will control the legal title so as to protect the just rights of the owner."

Sanford v. Sanford, 139 U. S., 642, Law.
Ed. Vol. 35, p. 290.

In the case from which the above is taken the *cestui que trust* neither paid the money nor had the legal title, and, legally, the rights of the *cestui que trust*, were much inferior to those of the Silver Bell Copper Company in this case.

Probably the nearest state of facts to those in this case, that we have been able to find are those in a case decided by the Court of Chancery of New Jersey. That Court said:

"The defendants deny the existence of any equitable right of the complainant. In doing so the defendants assume that the complainant must rest its claim on the existence of a resulting trust raised by the payment, on the part of the company, in the purchase of

these lots. The presumption of trust, however, can rest upon other grounds than the one mentioned. That Mr. Wood, when the options were taken for these lots, was acting as the agent of the prospective railroad company, is too clear for serious discussion. I am aware that the company, when it came into existence, was not bound by any contract therefor, made by Mr. Wood. The obligation of the corporation for the contract of the promoter must rest upon a ratification by the company. But Mr. Wood's position was such that the corporation, after it came into legal existence, could ratify his contract and assume the benefits of its provisions, and, of course, incur the obligations incident to it. Now, the corporation and its successors have always treated and used these lots as a part of its property, and so became entitled to the benefit of Wood's contract, and liable to the obligations which he incurred in its purchase. The rule is entirely settled that an agent or trustee, who, in his own name, makes a purchase while in the performance of his duty as such, holds the property for the benefit of his principal or *cestui que trust*. * . * . It is also settled that, if a person standing in a fiduciary relation, buys property so connected with a trust property that it must be used with a trust estate and an independent ownership would seriously affect the use and value of the trust property, he cannot retain the same to his own benefit. Perry on Trusts, Par. 129. But Mr. Wood claims that, while he bought these properties intending them to be used as terminals of the prospective railroad, yet he only intended to devote them to the use of the railroad, in

case the railroad paid him for them. * * * Whatever was in the mind of Mr. Wood at the time he took the original options, it is quite clear that, up to November 27th, when he changed his position from agent or director, to contractor, his relations with the prospective railroad, were fiduciary."

Seacoast R. R. Co. v. Wood (N. J.), 56 Atlantic 337.

See:

Stewart v. Douglas (Calif.), 83 Pac. 699.

See:

Miller v. O'Boyle, *et al.*, (Pa.) 89 Fed. 140.

The New Jersey court in the above decision cites a large number of authorities.

The powers of the Silver Bell Copper Company, as given in its articles of incorporation, are as follows:

"That the general nature of the business proposed to be transacted by said corporation is the locating, buying, selling, leasing, and working of mines and mining claims," etc. [Trans. of Rec., pp. 213-4, fols. 515-8, made part of Finding 1, p. 468, fol. 1140.]

The purpose for which the corporation was formed is not only evidenced by the articles of incorporation, but, as hereinbefore shown, not only did Curtis and Steinfeld both recognize the absolute necessity of the corporations having these

adjoining mines, but specially alleged it in their answer, thus clearly bringing this case within the principles of the foregoing cases.

When Steinfeld shut down the work on the Silver Bell Copper Company's mine, for the purpose of obtaining the title to the adjoining mines, he surely did not expect to get them for nothing. He knew they must be bought and paid for, and that the Silver Bell Copper Co. could only pay for them with funds that he or L. Zeckendorf & Co. must furnish to it, and he believed that if the English mines were not added to the properties of the Silver Bell Copper Co. the latter company would have but little ore remaining, and the debt due L. Zeckendorf & Co. would probably be at least a partial loss. This shut-down caused great loss and damage to the Copper Company. He therefore clearly intended to purchase the English group of mines for the Silver Bell Copper Co. and brought himself squarely within the principles of the foregoing cases.

Steinfeld could not, by juggling with papers and the records of the corporation, *absolutely controlled by himself* relieve himself from the trust without fully performing his duty in the matter, and without disclosing to the other persons interested in the corporation, and having power to represent it in a transaction between it and himself, the full facts and conditions involved in the matter. The amount of the pur-

chase price was not nearly so large as it was reported to be by Steinfeld. He actually paid out but a few dollars more than \$9,500.00, the rest was interest and the expense of the trip to Europe. The deed from the English company was made before he started on the trip, and was held subject solely to his paying the amount of the purchase price.

From July 15, 1901, until May 20th, 1903, when the mines were sold to the Imperial Copper Company, no change was made in the condition of ownership of these mines and shares of stock. Steinfeld made no effort to acquaint Zeckendorf with the facts or circumstances involved in the purchase of the property, and he made no effort to collect the money due him as trustee. He made no effort to enforce the payment of the money due him, but, on the contrary, he disregarded the time limit contained in the "proposition," and long after the expiration of the last extension, renewed, as a matter of course, the proposition for the purpose only, of having paid to him the money which he claimed he had expended in and about the purchases. It is true the fiction of an option from him was kept up, but it is also true that no reason appears why he should, on May 20th, 1903, voluntarily offer to give the corporation the cash proceeds of property then considered to be worth over \$250,000.00, if the corporation would allow him to retain \$18,-

117.00 of the said proceeds. If the option was an option, there was absolutely no obligation upon him to do this, and his action was purely voluntary, and without other reason than that he evidently believed that the corporation owned the properties purchased. Insisting that interest of one per cent. per month should be paid him on the moneys expended, can it be doubted he would have claimed a larger amount of money if he thought he was entitled to it?

There was a good reason, from Steinfeld's point of view, why the fiction of an option should be adopted and kept up. As before shown, Steinfeld wanted to keep Nielsen from sharing in the benefits of the purchase of the English group of mines. Nielsen's stock had not yet been purchased. An option for the benefit of the Silver Bell Copper Company existed for the purchase of the Nielsen stock, but if the Silver Bell Copper Company did not exercise that option, Nielsen would have shared in the benefit of the purchase of the English group of mines, if Steinfeld had declared that he held those mines in trust for the Silver Bell Copper company. If the option for the purchase of the Nielsen stock was never exercised, it would have been easy for Steinfeld to have defeated his option to the corporation for the English group of mines, and there is no doubt but Steinfeld would have then held the English group of mines

in trust for the firm of L. Zeckendorf & Company. It was with a view to the further workings and success of the Silver Bell Copper Company that Steinfeld determined to so shape his proposition, that the control of the situation should remain in his hands, and that the Silver Bell Copper Company should have the benefit of it in case Nielsen's stock was ultimately purchased. As shown by the findings, he unquestionably intended that no third party should profit by the ownership of the adjacent or English mines, and the fiction of an option was adopted for the purpose of excluding Nielsen as a third party.

During this time, as before shown, the corporation did all the assessment and other work upon the mines, used ores from them, entered their names upon its books as the property of the corporation, held out that it owned them, and as completely enjoyed them as it could have done if it had unquestioned legal and equitable title as well as possession.

The board of directors had no power to authorize the payment of the funds, in controversy, to Steinfeld.

On January 16, 1904, Steinfeld, Curtis and Shelton met as the board of directors of the Silver Bell Copper Company and authorized and directed Curtis, the treasurer, to pay to Steinfeld, \$145,437.50; to pay him by allowing him

to retain \$25,750.00, and to endorse and deliver him one of the Imperial Copper Company's notes then worth \$103,967.00, making a total of \$275,154.50, covered with the interest thereon, by the first cause of action. On January 20, 1904, the same parties met as such directors, declared a dividend of \$111.00 per share on the entire capital stock, and instructed the treasurer, Curtis, to pay such dividend "to the shareholders of record upon the books of the company." The treasurer thereupon paid Steinfeld the sum of \$145,437.50, endorsed and delivered him the said promissory note and paid him \$33,300.00 as a dividend on the 300 shares of stock purchased from Nielsen, making with the \$25,750.00 retained by Steinfeld, a total of \$308,454.00 presented by the said directors to Steinfeld without consideration and converted by Steinfeld to his own use. In the minutes of this corporate meeting are set out the alleged reasons for this action. They are as follows: Steinfeld was the actual owner of the English group of mines and the Nielsen mines, all of which were worth not less than one-half of the said \$515,000.00 purchase price paid by the Imperial Copper Company; was also the owner of the 300 shares of Nielson stock; and that the option that Steinfeld had given the Silver Bell Copper Company for the purchase of these properties which had been accepted by the Silver Bell Copper Company at the directors' meeting of May 20,

1903, and the guarantee agreement of the same date, had been rescinded by all parties to the transaction.

Under the findings of the fact made by the lower court these payments and the delivery of the note to Steinfeld were absolutely and unconditionally void, and was but the conversion by Steinfeld through the medium of alleged corporate acts, of the money for which this suit was instituted against Steinfeld, and his co-defendants.

For the sake of this discussion, however, concede every argument that the defendants can make. Concede Steinfeld was not a trustee but owned all the properties himself; that his duties to Louis Zeckendorf & Company, and his duties to the corporation did not require him to pay himself and confirm the title to the properties, in the Silver Bell Copper Company. Concede that the acceptance of his proposition made May 20th, 1903, was afterwards and by authority of a stockholders' meeting rescinded. Still he had no right to the money paid him by the directors. The lower court found that at all times Steinfeld was in control of the board by reason of his complete control of R. K. Shelton and that ever after June 6th, 1903, Steinfeld had complete dominion and control over all the officers and directors of the Silver Bell Copper Company; that they acted and voted as he directed, and not otherwise, the findings in that regard being as strong as language

could make them. Curtis and Shelton were but Steinfeld's "dummies and tools." He was the board. Surely, then, they could not, as between Steinfeld and the company, pass upon and determine the relative values of the properties sold to the Imperial Copper Company. At the *very least*, their duty to the corporation was not to pay Steinfeld anything until upon a full, independent, fair investigation, they ascertained what his interest was worth, and what their duty to the Silver Bell Copper Company required him to be paid for it. The records of their proceedings show that they made absolutely no attempt to do this. They simply acquiesced in such demands as Steinfeld made and did as he and his attorney ordered. For the sake of the argument, assuming, even, that the properties really belonged to Steinfeld, much remained to be done before the proportionate amount he was entitled to, could be ascertained. During the term commencing before July 15th, 1901, and until May 20th, 1903, the Silver Bell Copper Company not only did the assessment work on each of these mines, but it did a large amount of development work, all under instructions and directions from Steinfeld. Can it be contended that he was not liable for the expense of this work? Who can say on the testimony in this case, what amount of money was expended during this time on the English group of mines? Who can say how valuable to Stein-

field this work was in the way of developing and ascertaining the value of the mines? Is it not true that, if the money of the company expended in doing development work under Steinfeld's directions, upon the mines, had been used to pay Steinfeld, he would long before have been paid the amount due him on his so-called option? Who can say what part of the debt of over \$100,000.00 due L. Zeckendorf and Company, and what part of the debt paid by proceeds of the bullion that had been shipped, and the proceeds paid L. Zeckendorf & Co. should have been borne by Steinfeld personally? Steinfeld himself caused the confusion of funds upon the sale to the Imperial Copper Company. Can it be said that, having failed in his trust in not keeping the funds of himself and the corporation separate, he can afterwards arbitrarily say "this belongs to me and that to you?" What right had Steinfeld to cause his mines (if they were his) to be developed with money that he should have used to pay himself on his option? These and many more pertinent questions could not be and were not raised by the pleadings. The Silver Bell Copper Company had possession of all the proceeds of the sale. Its board of directors and officers were not only disqualified from judging between the rights of Steinfeld and the Silver Bell Copper Company, but, acting on orders of Steinfeld, they never made any attempt to do

so. We contend that, therefore, under any circumstances, the money, including the proceeds of the note paid to Steinfeld, must be returned to and retained by the proper custodian of the property of the Silver Bell Copper Company until these questions can be properly and equitably answered.

The contract, under which this money was paid to and received by Steinfeld, was void, and its fairness could not have been set up as a defense, even if it had been tried, and all money received thereunder must be turned back to the corporation.

Any contract between any director of the corporation, and the corporation, is presumed to be unfair and fraudulent, *and the burden is upon the director* to show its fairness and honesty, and that it was fairly entered into between himself and the corporation, and that at the time the corporation was represented by a sufficient number of independently acting directors to constitute a quorum.

A contract entered into between a director and a corporation of which he is in control or where there is not a quorum of directors acting independently of him, is presumed to be fraudulent and *is void* at the election of the corporation or a stockholder suing in its behalf and, in some jur-

isdictions, notably California, ITS FAIRNESS OR UNFAIRNESS CANNOT BE INQUIRED INTO.

2 Cook on Corporations (4th Ed.) Sec. 734, page 1588; note page 1549, also Secs. 734-879; also Sec. 741, page 1617;

3 Clark & Marshall on Private Corporations, page 1674 to 1678, 1683, 1690;

Morawetz on Corporations, Secs. 517 *et seq.*;

3 Thompson on Corporations, Secs. 4042 *et seq.* and 6503 *et seq.*;

3 Pomeroy's Eq. Juris., Sec. 1095;

21 Amer. & Eng. Ency. of Law, par. XII, pages 897, 990, 991;

1 Beach on Corporations, 241, 242, 246, 276;

Curtis v. Salmon River Co., 130 Cal. 345; 62 Pac., 552;

Bassett v. Fairchild, 132 Cal., 637; 64 Pac., 1082;

Wickersham v. Crittenden, 93 Cal., 17;

Bensick v. Thomas, 66, Fed. Rep., 104;

Jones v. Morrison (Minn.), Vol. 1, Am. & Eng., Cor. cases, 313;

Miner v. Bell, etc., 93 Mich., 97; 17 L. R. A., 412;

Beach v. Miller, 130 Ill., 162; 17 Am. St. Rep., 291, and the monographic notes to this case and the numerous cases there cited and reviewed;

- Smith v. Los Ang. Em. etc., Ass'n, 78
Cal., 289; 12 Am. State Rep., 53; 20
Pac., 657;
Hodge v. Price Steel Co., 60 L. R. A., 742
(N. J. Eq.);
Shaw v. Davis (Md.) 23 L. R. A., 294;
Waddell v. U. P. Co., 103 U. S., 651;
Fitzgerald v. F. & M. Co. (Neb.) 59 N.
W., 838;
Barr v. N. W. L. E. & W. R. R. Co., 96
N. Y., 144;
George v. Central R. & B. Co., 101, Ala.,
607 (14 South, 752);
Bell v. Montgomery L. Co., 103 Ala., 275;
15 South, 569;
Hannerty v. Standard Theater Co. (Mo.)
19 S. W., 82;
Knoop v. Bohmrich, 49 N. J. Eq., 82; 23
Atl., 118; 50, N. J. Eq., 485; 27 Atl.,
636;
Hardee v. Sunset Oil Co. (C. C.), 56
Fed. 57;
Martin v. S. C. Water Storage Co., 36
Pac. 36 (Arizona);
McConnell v. Comb, M. & M. Co. (Mont.),
76 Pac. 197-1904;
Robertson v. H. E. Buchlen & Co., 107 Ill.,
396;
The Telegraph v. Lee, 98 N. W., 364;
Adams v. Burke, 66 N. E., 235;

- Stewart v. Harris (Kansas), 66 L. R. A.,
261;
Cook v. Sherman, 20 Fed., 167;
Meeker v. Winthrop, 17 Fed., 48—affirm-
ed in Winthrop v. Meeker, 109 U. S.
180; 27 L. Ed., 898;
Pickett v. School District No. 1, 25 Wis.,
551; 3 Am. St. Rep., 105;
Vandever v. Asbury Park, etc., Ry. Co.,
82 Fed., 335;
People v. Township Board, 11 Mich., 222;
Cumberland Coal Co. v. Sherman, 30
Barb., 553, 572;
Ogden v. Murray, 39 N. Y., 202;
Doe v. N. W., Etc., Co., 78 Fed., 67;
Ten Eyck v. Pontiac St. R. R., 74 Mich.,
226; 16 Am. St. Rep., 633, 636, 637;
Borough of Milford v. Milford W. Co.,
124 Pa. St. 610;
Pearson v. Concord R. R. Co., 62 N. H.,
537; 13 Am. St. Rep., 590;
Wardell v. U. P. Ry. Co., 103 U. S., 657;
Twin Lick Oil Co. v. Marbury, 91 U. S.,
587; 23 L. Ed., 329;
Hawes v. Oakland, 104 U. S., 450;
Washburn v. Green, 133 U. S., 30; 33 L.
Ed., 516;
Thomas v. Brownsville, 109 U. S., 522; 27
L. Ed., 1018.

In the case of *Thomas v. Brownsville*, *supra*, Mr. Justice Miller says:

"We concur with the circuit judge that no such contract as this can be enforced in a court of equity, where it is resisted and its immorality brought to light.

"But as this Court said in the case of the *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587 (23 L. Ed., 328), such contracts are not absolutely void, but are voidable *at the election of the parties affected by the fraud*. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, *at the option of these latter to avoid it*; and until some act of theirs indicates such a purpose, it is not a nullity."

"In the present case the stockholders of the corporation, whose officers accepted those benefits at the hands of the parties, with whom they were, in the name of the corporation, making a contract for over a million dollars, do denounce and repudiate that contract. The conduct of these directors is utterly indefensible. The case of *Wardell v. R. R. Co.*, 103 U. S., 651 (26 L. Ed. 509) is in precise analogy to this. See, also, same case in 4 Dill., 330."

The case of *Smith v. Los Angeles I. L. Association*, 78 Cal., 289;; 20 Pac., 667; 12 St. Rep., 53, is a very strong case in view of the facts and because it has been cited with approval as a lead-

ing case and authority by almost every State, Appellate, and Federal Court in the United States. It is peculiarly in point here because of the fact that the contracts there in question *were fair*. They were not inequitable or unjust, as against the corporation, but were held *illegal because there was not a majority of the board of directors voting for them, who were not personally interested in their passage*.

In the case of *Curtis v. Salmon River Co.*, *et seq.*, 130 Cal., 345, 62 Pac., 552, and 80 Am. State Rep., 182, speaking of the position of an interested director, the Court says:

“For the purpose of any action upon this resolution, he was as much a stranger to the board as if he had never been elected a director and although he may have been physically present in the room with the other directors, he was not for that purpose a component part of the board any more than would have been any other bystander, and there was not, therefore, a quorum of the board present and acting at the time the resolution was adopted.”

In *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, it was held that directors of a corporation who are directly and personally interested in the contract adversely to the stockholders, cannot authorize a contract on behalf of the corporation, and a contract attempted to be so authorized by them is void. The fact that the contract was open and that the profit to be derived

therefrom was not secret, cannot render the contract valid. The publicity alone of an alleged and unauthorized act of the directors of the corporation does not make it legal or valid.

The case of *Bill v. Western Union Telegraph Co.*, 16 Fed., 14, 16, *et seq.*, per Wallace, J. (S. D. of N. Y.) is an excellent treatise on the rights and powers of directors to make contracts with themselves, or with other corporations in which they are largely interested. (Read commencing on top of page 16.)

Martin v. S. C. Water Storage Company, 36 Pac., 36, is a *decision by the Arizona Court*, and very strongly and clearly sets forth the rules for which we contend; to us it seems conclusive of this case. We will not quote from the opinion, but ask this court to read what it has there said with reference to actions of this kind and to the question of the fairness or unfairness of the contract.

This case is followed in *McConnell v. Comb, M. & M. Co.* (Mont.) 76 Pac., 197, 205, *et seq.* Another strong decision and, because of its citation of, and reliance on the *Martin* case, well worthy of special attention.

In *Combs v. Barker*, 79 Pac. 1, 9, and 10 (Mont., Jan., 1905), it was said:

"Breach of official duty by directors of a corporation is fraud in law against the stockholders and is sufficient to entitle the latter to relief, *though no fraud, in fact, be shown.*"

Attention is particularly called to what is said on this branch of the subject in column one of page ten.

Hodge v. U. S. Steel Co., 54 Atl. Rep., 1, holds that *where only one of the directors was debarred, their action was voidable and not void.*

The managing officers of a corporation are not only trustees of the corporation entity and of the corporation property, but, in a certain sense, and to a certain extent, for the shareholders also.

Stewart v. Harris (Kans.) 66 L. R. A.,
261.

In Ten Eyck v. Pontiac, etc., R. R. Co., 74 Mich., 226; 16 Am. State Rep., 633, it was said:

"The directors of a corporation are its agents. The entire management of corporate affairs is committed to their charge, upon the trust and confidence that they shall be cared for and managed within the limits of the powers conferred by law of the corporation, and for the common benefit of the stockholders. They are required to act in the utmost good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and exercise the powers conferred solely in the interests of the corporation. They have no right to represent the corporation in any transaction in which they are personally interested in obtaining an advantage at the expense of the company they represent. 1 Morawetz on Private Corporations, Sec. 517."

"The appellants and their associates were not in a situation permitting them to secure to themselves a personal advantage in the matter. The stockholders and creditors were entitled, not only to their vote on the board, but to their influence and argument in the discussion which led to the passage of the resolution, in pursuance of which they took title as trustees. This brings the case within the rule, which rests in the soundest wisdom and is sustained by the best consideration of the infirmities of our human nature, and called for by the only safe protection of the interests of *cestuis que trust* of beneficiaries viz.: that trustees and persons standing in similar fiduciary relations shall not be permitted to exercise their powers and manage or appropriate the property of which they have control for their own profit or emolument or, as has been expressed, shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their *cestuis que trust*."

Ogden v. Murray, 30, N. Y., 202.

Cumberland Coal Co. v. Sherman, 30 Barb., 353, is a leading, much cited, and largely quoted case. At page 572 of the report, it is said:

"Neither are the duties or obligations of a director or trustee altered from the circumstance that *he is one of a number of directors* or trustees, and that this circumstance diminishes his responsibility or relieves him from incapacity to deal with the property of his *cestui que trust*. The same principle applies to him as *one of a number* as if he were acting as sole trustee. It is not doubted that it has been shown that the

relation of the director to the stockholder is the same as that of the agent to his principal, the trustee to his *cestui que trust*; and out of these relations *necessarily spring the same duties, the same dangers and the same policy of the law.*"

"In the language of the plaintiff's counsel, it is justly said: 'Whether it be a director dealing with a board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest—the principal—is absent; the watchful and effective self-interest of the director or trustee, seeking a bargain, is not counteracted by the equally watchful and effective self-interest of the other party who is there only by his representatives.' The number of the directors or trustees does not lessen the danger, or insure security that the interests of the *cestui que trust* will be protected. *The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self-control.*"

An interested director cannot be counted to make up the quorum, so as to authorize or ratify an action taken in his favor.

Bassett v. Fairchild, 132 Cal., 637; 64 Pac., 1082.

Curtis v. Salmon River, etc., Co., 130 Cal., 345; 62 Pac., 552.

In this latter case it was said:

"The respondent relies upon the following provisions of Sec. 308 of the Civil Code; 'A majority of the directors is a sufficient num-

ber to form a board for the transaction of business and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act.' Under his construction of this provision, it is immaterial whether Wells abstained from voting, or even voted against the resolution. *Such construction would, however, enable an interested director to accomplish by indirection what the policy of the law forbids him from doing.* It does not appear, either from the minutes of the board or from any testimony in the case, whether Wells voted for the resolution or not. Although he was a director of the corporation, yet he was disqualified from voting or in any mode acting in his official capacity as a director, for the purpose of creating an obligation of the defendant in his own favor (*Wickersham v. Crittenden*, 93 Cal. 17). As was said in this case, *so strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into,* and in *Shakespear v. Smith*, 77 Cal. 64, 3, this Court said: '*In such cases the Court will not pause to inquire whether a trustee has acted fairly or unfairly: being interested in the subject matter, he may not as a trustee deal with himself and thus be subjected to the temptation to advance his own interests.*' The same rules which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote, forbid him from uniting with them in creating such obligation by any act or exercise of his official position, and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a

competent board for the transaction of any corporate business. * * * ”

“By reason of the disqualification of Wells from taking any part in passing the resolution for executing the note and mortgage to himself, he could neither vote in favor of the resolution, nor by his help create a quorum by which the other two directors could adopt it. For the purpose of any action upon this resolution he was as much a stranger to the board as if he had never been elected a director, and although he may have been physically present in the room with the other two directors, he was not for that purpose a component part of the board, any more than would have been any other bystander, and there was not therefore a quorum of the board ‘present and acting’ at the time the resolution was adopted.”

“In *Jones v. Morrison*, 31 Minn. 140, it was held that a director of a corporation ‘cannot properly act on or form part of a quorum to act’ on a proposition to increase his compensation. In *Van Hook v. Somerville Mfg. Co.* 5 N. J. Eq. 137, 169, the Chancellor said that a member of a corporation contracting with it is regarded as to that contract, as a stranger; and held that, as the corporation was managed by five directors, one director could not, with two others, constitute a board to vote a mortgage from the company to himself. This case was afterward reversed upon other grounds, but no dissent from this rule was expressed. In *Copeland v. Johnson Mfg. Co.*, 47 Hun. 235, where the corporation was governed by a board of five trustees, it was held that an agreement made by it in favor of its president, under the authority of a vote of him-

self and two other trustees, was invalid. Under a similar state of facts, in *Butts v. Wood*, 37 N. Y. 317, the Court held that the board as thus constituted, had no authority to entertain a bill in favor of one of its members, or to do anything in relation to it; that the claimant was disqualified from acting because he could not deal with himself, 'and without him, there was no quorum of the directors and they had no authority to transact business.' "

A director and officer of a joint stock corporation occupies a fiduciary relation, and his dealings with the subject matter of his trust or agency and with the beneficiary or party whose interest is confided to his care, *are viewed with jealousy and distrust by the courts and may be set aside on slight grounds.*

Curtis and Shelton being but the mere representatives, tools and instruments of Steinfeld and on the board but to do his bidding, were in exactly the same position, and labored under the same disabilities as did Steinfeld.

Washburn v. Green, 133, U. S. 30; 33

L. Ed. 576;

Woodroof v. Howes, 88 Cal., 184-202;

26 Pac., Ill.; and

Miner v. Belle Isle Ice Co., 17 L. R. A.,

412.

Steinfeld, voting a large majority of the stock, had from time to time elected the directors.

In the Belle Isle Ice Co. case, it was held that directors owning nominal quantities of stock presented to them by the majority stockholders *were not disinterested directors, but were interested in matters in which he was interested, and that their votes would be classed and treated the same as his.* The opinion is by McGrath, Judge, and because of its peculiarly strong application to the case at bar, we take the liberty of making the following rather extended quotations therefrom, viz.:

"No one of Lorman's associates on the board of directors for the six years preceding the filing of this bill, is sworn, or offers any testimony to sustain any act of said board during that period. Lorman only appears. Gray, Linn, Muir, and Prentis, severally answer, but each neither admits nor denies the charge made in the bill, and neither alleges even good faith. Under all the rules governing the relation of directors of a corporation to that corporation and its stockholders and their conduct pending that relation, the simple statement of the facts of this case ought to decide it. It is said by Justice Miller in *Twin Lick Oil Co. of West Virginia, v. Marbury*, 91 U. S. 587, 23 L. Ed. 329: 'That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of the trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the

clearest recognition in this Court and in others.' The authorities upon the question of the validity of contracts made by directors with the corporation, are by no means harmonious. It is laid down in many of the text books that such contracts are voidable at the instance of the corporation. 1 Beach Corp. 241, 242; Morawetz Priv. Corp., 243-245; Taylor Corp., 629, 630; 2 Field, briefs 193. * * *

"Our own court in *People v. Overysse*. Twp. 11, Mich., 222, and in *Flint & P. M. R. Co. v. Dewey*, 14 Mich., 477, have held that such contracts were not only voidable, but absolutely void. In *People v. Overysse*, Twp. Manning, J., says: '*Actual injury is not the principle* the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal.' Christiancy, J., in the same case says: 'As individuals in taking the contract, they must naturally (and while human nature remains unchanged we may almost say necessarily) seek to make terms most conducive to their own interest. The public were entitled to their best judgment, unbiased by their private interests, and by accepting the office, they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public. And though these contractors may, as members of the board, have act-

ed honestly and solely with reference to the public interest, yet if they have acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection. *If, therefore, such contracts were to be held valid until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption.*' Campbell, J., dissenting, says: 'It is a well settled principle that the same person cannot be vendor and purchaser, because his contract lacks the necessary element of two parties; neither can a trustee become interested to the detriment of his *cestui que trust*, or an agent to the detriment of his principal. Even those contracts, however, are not universally void. They are usually voidable, *at the option of the party defrauded or affected*, but they are not absolutely void, except where, by reason of the identity of the vendor and vendee, a contract is in the eye of the law impossible.

* * * The only exception seems to be the one already referred to, where the corporation cannot act at all without the action of some particular person, who is thereby disqualified from dealing with himself, and who, of course, cannot contract with himself. 1 Kyd. Corp. 180, 181; Eng. & Amer. Corp. 233. In other cases and where the contract may be made on behalf of the corporation without the assistance of a particular member or officer, a contract with him is as valid as if he were a stranger.' "

"The present case is clearly within the exception referred to by Campbell, J. Defendant Lorman must be held to have made these contracts with himself. *He directed, influ-*

enced, and controlled the board. They had no personal interest in the affairs of the company, and *exercised not their own judgment and discretion, but Lorman's will.* All the authorities agree that it is essential that the majority of the quorum of a board of directors shall be disinterested in respect to the matter voted upon. 1 Beach Corp. 276; Smith v. L. A. Immigration & L. C. Assn., 78 Cal. 289. Where a town board of three is authorized to make a grant to a railroad, and two of them, one being a director of the railroad, makes the grant, the court will set it aside. San Diego v. San Diego, and L. A. R. Co., 44 Cal. 106; Bill v. Western Union Tel Co., 16 Fed. Rep. 14."

"A salary voted to the president by a quorum of three directors, two being absent and the president being one of the three, is not enforceable. Copeland v. Johnson Mfg. Co., 47 Hun. 235. Where the chief stockholder, who is president, induced the directors, his dummies, to vote a large salary to him, the corporation may defeat the officers' action at law to recover it. Davis v. Memphis City R. Co. 22 Fed. Rep. 883. Where the majority of stock of a corporation was held by one family who voted away the corporate profits for salaries, the minority may call upon a court of equity to remedy the fraud. Sellers v. Phoenix Iron Co., 13 Fed. Rep. 20. A stockholder may compel the contractors to disgorge *when they obtain a contract through their associates or hirelings, being made directors.* * * * "

"The contracts fixing salaries and rentals must therefore be held not only voidable, but absolutely void. *In any case, the burden is upon the director to show fairness, reason-*

ableness and good faith, and upon this record, these transactions must not only be held to be constructively fraudulent, but fraudulent in fact."

The Supreme Court of the United States has been called upon to consider this question from almost every point of view. The leading cases in that court are those which we have cited, viz.:

Hawes v. Oakland, 104 U. S. 450;

Thomas v. Brownville, 109 U. S. 522; 27 L. Ed. 1018;

Washburn v. Green, 133 U. S. 30; 33 L. Ed. 516;

Twin Lick Oil Co. v. Marbury, 91, U. S. 587; 23 L. Ed. 329;

Wardell v. U. P. Ry. Co., 103 U. S., 657.

In the case of *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, it was held that express contracts between the controlling directors of a corporation, and the corporation, were void or at least voidable at the election of the corporation or any outside stockholder. The opinion on this point was written by Justice Lorigan. It will be observed that there are two cases involved in the appeal, one by the corporation to set aside certain written notes and the other by Smith against the corporation on the notes. Commencing on p. 360, speaking on this question, the court says:

"Broadly stated, the legal proposition insisted on by appellant is, that one occupying

a fiduciary or trust relation to a corporation, cannot, while such relation exists, enter into any express contract with himself individually, relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at the mere election of the corporation, if not absolutely void; and that when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction, nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary. Such an inquiry cannot be entered into.

"It will be observed that no question is involved in this action of the right of a director who has advanced or loaned money to a corporation, to recover it back on a *quantum meruit*, and decisions which sustain such a right have no application. The action at bar is one brought by a director who, as president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become endorser of the notes to himself, individually, as indorsee, and is now seeking to enforce such contract of endorsement against his corporation.

"His suit is brought upon an express contract, the making of which and its enforcement are equally prohibited by law."

"In this regard, the general principle is clearly stated in *Bensiek v. Thomas*, 66 Fed., 104:

"It is an elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property, or borrow money, sell his own property, or loan

his own funds, without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. The doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation, when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually. In short, an officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer." (Wardell v. Railroad Co., 103 U. S., 651; Mallory v. Mallory, Wheeler Co., 61 Conn., 131; Bigelow on Fraud, 217; Ferry on Trusts, Sec. 207.) And in Morawetz on Private Corporations, (Sec. 517) it is said: "The directors of a corporation have no authority to bind the company to any contract made with themselves personally. * * * Thus a president, cashier, or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or endorse a note to himself or certify a check for his own benefit."

"This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, these must be the assent of two separate independent minds; that no man can effectually make a contract with himself.

"In the case at bar, the respondent, Smith, assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors or with other agents thereof. He was dealing with himself,—contracting as president with himself as an individual, and

was the contracting party on both sides. The corporation made no sale of these notes to or contract of indorsement thereof with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in *Mercantile Mutual Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 410, may pertinently be applied: 'A contrivance which reduces the two parties to one, and admits an agent, representing antagonistic interests, to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent.'

"In *Clark & Marshall's Private Corporations* (Vol. 3, Sec. 759) the rule is concisely summed up in this language: 'A person cannot, as director or other officer of a corporation enter into a valid contract on behalf of the corporation, with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation on one side and for himself on the other can make no difference.' * * *

"So applied, the law is inflexible, that one, acting in such fiduciary capacity, will not be permitted to deal with himself in his individual capacity relative to the trust property.

"Upon this point, as we have said, the current of authority in this state is unbroken, and it will only be necessary to refer at length

to a few of the cases which clearly and uncompromisingly announce the rule, with general citations to such others from our own court as affirm the doctrine."

The court then quotes extensively from *David v. Rock Creek etc. Co.*, 55 Cal. 364; 36 Am. Rep. 40; *Sims v. Petaluma Gaslight Co.* 131 Cal. 659, and other cases. Continuing on page 365, the court says:

"These authorities lay down two propositions: 1. THAT AN EXPRESS CONTRACT CANNOT BE ENTERED INTO BY A DIRECTOR WITH HIMSELF RELATIVE TO THE TRUST PROPERTY. 2. THAT THE COURT WILL NOT PERMIT ANY INQUIRY INTO THE QUESTION OF THE HONESTY OR FAIRNESS OF THE TRANSACTION.

"The philosophy of this rule is quite apparent, and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self-interest prompts him to make the best bargain for himself. Humanity is so constituted that, when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that his temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or en-

force any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction."

The court then quotes extensively from *Munson v. Syracuse etc. R. R. Co.*, 103 N. Y. 74, a very strong case.

As further authorities to the effect that, where a director or officer of a corporation is in control of the board of directors so that he has it in his power to direct action of a majority of the board, any action of that board in matters where such director or officer was personally interested would be held to be void when attacked either by the corporation or by stockholders suing in its behalf, we refer this court to the following additional authorities:

Jackson v. Brooklyn Lumber Co., 76 N. E. Rep. 1075;

Greathouse v. Martin, 91 S. W. Rep. 385;

Van Armin v. Am. Tube Works, 74 N. E. 680;

Savage v. Madelia Farmers' Warehouse Co., 108 N. W. 296;

McCourt v. Singers-Bigger, 145 Fed. 103.

We particularly direct the court's attention to the language used by Judge Chase of the Appellate Division of the Supreme Court of the state of New York, in the case of *Jackson v. Brooklyn*

Lumber Co., appearing on page 1078 of the reporter, reading as follows:

“The relation of an officer of a corporation to it is fiduciary, and he must at all times act in good faith and unselfishly toward the corporation. The relation is such that an officer of a corporation cannot make an agreement with himself, acting on the one part individually and for his own benefit, and on the other part in his fiduciary capacity as an officer of the corporation. It is said in 10 Am. & Eng. Cyc. of Law, 790: ‘A director cannot, with propriety, vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case, and any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted, will be voidable at the instance of the corporation, or the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result.’ The courts in this state have frequently asserted the voidability of the acts and votes of corporate officers, when they are affected by private interests.”

Not only does the law presume that a contract entered into, as was the contract of January 16th, 1904, between the Silver Bell Copper Company and Albert Steinfeld was unfair, fraudulent, and void, but, in addition, there are no allegations or pleadings or evidence in this case by which this or any other court could determine, if it had a right to, how far that unfairness extends, or what rights Steinfeld had as against the corporation on

January 16th, 1904, if he had any. Even if the law permitted the court to inquire into the matter and determine what, if anything, Steinfeld might be entitled to, it could make no such inquiry in this case, for there is nothing whatever to base an inquiry on.

Under the pleadings and findings in this case there is absolutely nothing before this court to show how far the unfairness, which the law in all such dealings presumes, in this case extends. The burden, even in cases where the interested director is not in control, would be upon him to show conclusively that the contract was fair and that, in equity, it should stand as against the corporation.

Bearing in mind that this is a suit by a stockholder to compel the delinquent officers to restore the *status quo*, as it existed before they attempted to do the wrongful act complained of, we submit that all of the money and the proceeds of the note misappropriated by Steinfeld must first be paid back into the treasury of the company from which they were wrongfully taken before he can be heard in any court of law or equity to make a demand against the corporation; this, even though this Honorable Court should not find that our other contentions in this case are sustained.

In any controversy that might arise between the corporation and Steinfeld, as to the ownership of that money and those notes, and the ap-

portioning of the same, the physical possession of the same by the corporation, would be a thing of great value. Possession in such a case would almost prove the old adage that "Possession is nine points in law."

No one denies that the full, legal, equitable TITLE to the money and notes became vested in the corporation at some time of the day on May 20th, 1903. The full unconditional POSSESSION of the same was turned over to the corporation by Steinfeld between the morning of December 26th, 1903, and January 10th, 1904. To divest the corporation of either legal or equitable title, or possession, by a contract required the action of a board of directors, uncontrolled by the other party to the deal.

The corporation is entitled in this action to have all that money paid back to it, no matter what interest Steinfeld may have had before and at the time of the sale to the Imperial Copper Company in the properties sold.

By arguing that the money must be paid back to the corporation, regardless of whether or not, Steinfeld personally had any claim against the company on account of that deal, we do not for one instant, want to be understood as conceding in the slightest, that on January 16th, 1904, Steinfeld did have any such claim; and we insist that we are entitled to a decree in this case not only that the money and the proceeds of the note, with

the interest at the Arizona legal rate must be paid back into the treasury, but that it be paid back freed from any and all claims of Steinfeld against the company on account thereof.

Plaintiff-Appellant's Difficulties in this Case.

It is fair to ask this Honorable Court to consider the difficulties the plaintiff-appellant had to labor under in producing the evidence to sustain his allegations in this case. As has been shown, plaintiff-appellant knew nothing except in a very general way of the business of the Silver Bell Copper Co. The only persons ever directly connected with the corporation and its business were Nielsen, Steinfeld, Curtis and Shelton. Nielsen died long before this case was commenced. [Trans. of Rec., Finding XXVII, p. 491, fols. 1189-90.] The other three are all defendants in this case, and as hereinbefore shown, were all acting together under Steinfeld's dominion and control, doing the utmost to defeat the action of plaintiff-appellant herein. They have always had and held in their possession, all records, books, and documents of the Copper Company and they alone possessed the knowledge of the facts and circumstances justifying this action. If they were actuated by wrong motives, it is more than probable that they did their utmost to keep out of this case any and all evidence tending to show their wrongdoing, and did produce and introduce

in evidence everything that could benefit their cause. Probably appreciating this fact, the findings of the lower court were often very full of what might be considered evidence. We believe, however, that they could not in justice to both parties, be more condensed and that in some cases they should have been even more comprehensive.

The Indebtedness of the Incorporation in Excess of \$25,000.

It was strenuously urged by defendants-appellants in the territorial courts that because the corporation was in debt in excess of \$25,000, at practically all times, it could not buy the "English Group" of mines or the Nielsen stock, because such purchase would increase the corporation's indebtedness, which was already beyond the limits allowed by law. While we feel that there is nothing in this contention of defendants-appellants, nevertheless, the insistency with which it has been urged by eminent counsel of the other side, make it advisable that we give it some consideration. The creation of an indebtedness by a corporation in excess of the limits prescribed by law, is not an *ultra vires* act, but is simply an excessive exercise of the corporation's powers. The statutes of Arizona relating to corporations, is taken from the state of Iowa. The case of Sioux City R. R. et al. v. Trust Bank of New York (C. C. A.), 82 Fed. p. 124, was before that court on appeal from

the northern district of the state of Iowa. The case was subsequently appealed to this Honorable Court, and the decision of this court is reported in 173 U. S. p. 100. The position of a corporation which has in good faith exceeded its statutory limits of indebtedness, was in these cases fully discussed. The fact that the statute prescribed no penalty was noted, and the validity of the excessive debt was affirmed, so that under that decision, the indebtedness of the Silver Bell Copper Company did not prevent the latter company from purchasing the "English Group" of mines or the shares of stock belonging to Nielsen, provided someone would advance or lend it the money, or provided that it had the money on hand. There was no finding made by the territorial court to the effect that the Silver Bell Copper Company did not have funds on hand, notwithstanding its indebtedness, with which to make this purchase, or could not have obtained the money from Louis Zeckendorf or some one else, to have made these purchases, if necessary; and therefore the indebtedness of the corporation has no part in this controversy. If this question had arisen before the sale of the company's property, and the corporation had sued Steinfeld for the English Group of mines and the Nielsen stock, it would, of course, have had to tender to Steinfeld the amount of money he was rightfully entitled to by reason of his expenditures and a reasonable compensation

in acquiring the property; but, the fact that the corporation was in debt would not have precluded it from bringing this suit, for the judgment would not have had the effect of making Steinfeld a creditor of the corporation, as the corporation would have been required to tender the money or its equivalent in court. Again, as we have pointed out heretofore, Steinfeld closed down the workings of the Silver Bell Copper Co. at a time when it was in debt some \$30,000, and at a time when it was making a profit out of its business, for the purpose of acquiring these "English Group" of mines and the Nielsen stock. Had Steinfeld not closed down the mine, it is more than reasonable to suppose that long before Steinfeld paid any money on account of the purchase, the mine would have reduced its indebtedness to such an extent as to have enabled it to borrow money, if necessary, to buy the properties, and still be within the \$25,000 indebtedness limit. Again, the statutes of Arizona provide that the indebtedness shall be limited to two-thirds of the capital stock of the corporation.

Revised Statutes of Arizona (1901) Sections 767 and 770.

"767. (Sec. 7.) * * * Such articles of incorporation must specify the highest amount of indebtedness and liability, direct or contingent, to which the corporation is at any time to be subject, which must in no case

exceed two-thirds of the amount of the capital stock."

"770. (Sec. 10.) The capital stock of any corporation organized hereunder may be increased or decreased and the articles may be amended in any of the particulars mentioned in section 6 of this title by the affirmative vote of a majority of the stockholders. Such amendment shall be signed and acknowledged by the president and attested by the secretary of the corporation, and no such amendment shall be valid unless recorded and published as the original articles are required to be."

Neither all of the capital stock of a corporation, nor any considerable part thereof, is required to be sold or issued as a pre-requisite to a corporation's doing business. Amendments to the articles of incorporation increasing the capital stock can be made at any stockholders meeting, by a vote of the majority of the stockholders, as shown hereinabove; and Steinfeld, by reason of the control of the corporation which he had, and the voting power of a majority of the issued stock which he had, could at any time have increased the capital stock to any necessary amount sufficient to validate not only the indebtedness the corporation had, but ten times that amount, if necessary. This increase of the capital stock would neither have to be subscribed for, issued nor sold, so that under the laws of the territory of Arizona, the limitation of indebtedness is intended solely as a protection to the stockholders against fraud or other

wrong on the part of the officers or the directors. It is, in fact, merely a form.

The Attorneys' Fees and Costs of Plaintiff-Appellant.

The Arizona court found as a fact that plaintiff-appellant was entitled to a judgment for "all the sums of money expended by him as and for costs and attorneys fees," etc., "that ten per cent of the amount for which judgment is finally given in this action is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Co. as attorney's fees for bringing and prosecuting this action for its benefit." [Trans. of Rec. Finding XXXIX, p. 510, fols. 1229-30.] The judgment of the trial court was in favor of plaintiff-appellant for \$20,850.00 with interest at six per cent per annum from January 20, 1900, for his costs and for \$2,652.50 attorneys fees. This sum of \$2652.50 was ten per cent of the amount of the actual judgment. The amount of the judgment entered, viz., \$20,850.00, was the amount of the actual judgment, less certain sums expended by Steinfeld for the benefit of the corporation, subsequent to the bringing of this action. The judgment is found in the transcript of record, at pages 427-8, folios 1044-9. This judgment was affirmed by the Supreme Court of Arizona. [Trans. of Rec., pp. 4534, fols 1108-9.] We ask, therefore, that in case a new

or different judgment is ordered entered by this court, that the attorney's fee allowed be fixed at not less than ten per cent of the amount for which judgment is "finally given" and that judgment be ordered for plaintiff-appellant "for all of the sums of money expended by him as and for costs and attorneys fees," in this case. The amount of fees, and costs cannot be ascertained from this record but can be by the Arizona Supreme Court.

In Conclusion.

On January 16, 1904, Steinfeld was paid on the order of the board of directors of the Silver Bell Copper Co. \$145,743.75 in cash; one note for \$100,000, for which he subsequently received the principal and interest, amounting to \$103,967.00. On January 20, 1904, he was paid on the order of the said board of directors, \$33,300.00 dividends of the (Nielsen) 300 shares of stock, making a total of \$283,010.75 wrongfully and unlawfully, as we have argued, paid Steinfeld from the corporate fund. Steinfeld at the beginning of this suit had \$25,750.00 in cash belonging to the corporation which had been garnisheed in his hands, in the S. M. Franklin suit. These sums together make a total of \$308,760.75 [Trans. of Rec. Findings XXXV, XXXVI and XXXVIII, pp. 507-10, fols. 1222-9] for which, with interest at the rate of six per cent per annum from January 16th, 1904, plaintiff-appellant asks this Hon-

orable Court for a judgment against the said Steinfeld with instructions to the trial court to ascertain and allow Steinfeld in a proper proceeding, such credits for money rightfully and lawfully paid out by him in the matter of the said Franklin garnishment proceedings as he shows himself entitled to.

In addition to this judgment plaintiff-appellant is entitled to a judgment, in this proceeding, against the Silver Bell Copper Company, properly made a defendant in this case, for an amount equal to ten per cent of the amount recovered herein for it, plus all money he has expended for costs herein on account of the corporation or for its benefit.

Respectfully submitted,

FRANK H. HEREFORD,

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Attorneys for Plaintiff-Appellant.

WILLIAMSON COUNTY

CLERK OF THE COURT

NAME OF PLAINTIFF	NAME OF DEFENDANT
RESIDENCE OF PLAINTIFF	RESIDENCE OF DEFENDANT
NAME OF WITNESS	NAME OF WITNESS
NAME OF WITNESS	NAME OF WITNESS

MADE UP BY THE CLERK

WILLIAMSON COUNTY

CLERK OF THE COURT

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IN THE
Supreme Court
OF THE
United States

Louis Zeckendorf,	<i>Appellant,</i>	No. 139
<i>vs.</i>		
Albert Steinfeld, et al.,	<i>Appellees.</i>	No. 140
<i>vs.</i>		
Albert Steinfeld, et al.,	<i>Appellee.</i>	
Louis Zeckendorf,		

BRIEF.

The complaint sets forth two causes of action.

The subject-matter of the first cause of action is the so-called English group of mines.

The subject-matter of the second cause of action is the three hundred shares of stock of the Silver Bell Copper Company.

Judgment was rendered in favor of the defendants on the first cause of action, and in favor of the plaintiff on the second cause of action.

Both parties appealed to the Supreme Court of the territory of Arizona, where the judgment was affirmed.

From such judgment both parties have appealed to this court.

STATEMENT OF FACTS.

From 1878, and until the commencement of this action, the plaintiff, Louis Zeckendorf, and the defendant, Albert Steinfeld, were partners engaged in the mercantile business in Tucson under the name of L. Zeckendorf & Company. The defendant, Steinfeld, under the terms of the partnership, was the active manager and in control of the business of the firm. The plaintiff was a resident of the city of New York and only occasionally visited the territory. As ancillary to their business the firm became more or less interested in various mining enterprises. A property situated in Pima county, known as the Old Boot mine, prior to January, 1899, was held by Steinfeld as trustee for William Zeckendorf and his wife, Julia Zeckendorf. One Carl Nielsen had been given a contract by Steinfeld for working and operating said property on a royalty and had become indebted to the firm of L. Zeckendorf & Company in the operation of the mine. The contract was terminable at will. On the last mentioned date, in order to protect the firm on account of this indebtedness, Steinfeld caused a corporation to be formed under the name of the Nielsen

Mining and Smelting Company, to which was transferred Nielsen's interest under this contract, the machinery and other personal property owned by him and used in its operation, in consideration of all its capital stock, and the assumption by the corporation of his debts to L. Zeckendorf & Company. It was capitalized at \$25,000. Its authorized indebtedness was limited to the sum of \$25,000. [Fol. 518.] It was not authorized to purchase or own its own stock or that of any other corporation. Some time after the organization of the company, Steinfeld, as trustee for William and Julia Zeckendorf, gave an option to the Nielsen Mining and Smelting Company on the Old Boot mine, for an agreed price of \$25,000, to be paid to William and Julia Zeckendorf in installments of \$2500 each, to be paid each three months. [Statement of facts, fol. 936.] Nielsen assigned to L. Zeckendorf & Company 670 shares of the capital stock, and to Steinfeld as trustee 30 shares of the capital stock, retaining for himself the balance of 300 shares of the capital stock. The firm of L. Zeckendorf & Company put one share in the name of the defendant Shelton, to qualify him as a director, and gave 170 shares to defendant Curtis, in consideration of the services thereafter to be performed by the latter for the company, and retained 499 shares for itself. The defendant Shelton was an employe of L. Zeckendorf & Company, and the defendant Curtis had

charge of the mining business of the firm. Curtis was elected director and president of the company, and Sheldon director and secretary. Nielsen was elected a director and became manager and superintendent of the company. Steinfeld, while not an officer or director of the company, was, nevertheless, recognized as the ruling manager of the corporation, and was, in fact, in control, through the officers, of its affairs. Such management and control of the corporation was assumed by Steinfeld and assented to and acknowledged by the other defendants, Nielsen and the plaintiff, not in his individual capacity, but as managing partner of L. Zeckendorf & Company. [Fols. 93 and 938.] The name of the corporation was subsequently changed to the Silver Bell Copper Company, and we will hereafter speak of it by this name.

Contiguous to the Old Boot mine was a group of mining claims known as the English group, which was owned, at the time of the organization of the corporation, by residents of England. On the first of January, 1900, these mining claims were re-located by one Francis and one Volkert under the claim that the title of the English owners had become forfeited. The English owners, however, still claimed title to the group upon the theory that such locations having been made by their employees, inured to their benefit. Curtis, as the president of the company,

had frequently advised and notified Steinfeld, and Steinfeld at all times had known, and Zeckendorf had been told and informed by Steinfeld, that it was desirable that the English group of mines should be purchased in order that all of the mines and claims surrounding the Old Boot should, with it, constitute one group, and might be sold as one group and one property; as any intending purchaser would, upon examination of the Old Boot mine, soon ascertain that the ore bodies therein probably extended into the English group of mines, and because of the fact that all purchasers of large mining properties desire to control all claims immediately surrounding any developed mine or mines. [Finding 9, fol. 943.] In January, 1900, and the spring of that year, when the mine, as will hereafter appear, was closed down, the company was indebted to the firm of L. Zeckendorf & Co. in an amount approximating \$30,000 over and above the value of all matte and bullion then on hand or in transit [finding VII, fol. 940], and such indebtedness was at all times thereafter greater than such amount. Nielsen went on continualsprees, and Steinfeld considered him a disturbing element. Early in the year 1900 he became dissatisfied with him and determined to get rid of him by buying his shares of stock. Under the advice of Steinfeld the directors discharged Nielsen and appointed Curtis in his place and stopped work on the Old Boot mine.

The court found that Steinfeld at the same time ordered the mine to be closed down as soon as the coke and ore on hand should be used up, and that his purposes in closing the mine were to effect a purchase from Nielsen of the 300 shares of stock held by him, and also, that the English group of mines might be purchased from the English owners, as well as the Francis-Volkert title, at a nominal or small sum; that although the mine was paying, and at the time being worked at a profit, its closing down was to prevent the owners of the English group from obtaining knowledge that the ore body of the Old Boot property did and would extend into the ground covered by the English group.

On May 16th, 1900, Steinfeld purchased the title held by Francis and Volkert to the English group for \$15,000, \$2500 in cash and \$12,500 payable upon the sale of the mines. This was Steinfeld's money and his individual obligation. [Fol. 385.] At the same time he organized the Mammoth Copper Company for the purpose of taking over this title. The stock of this company was owned and held by Steinfeld individually.

A day or two prior to the 29th of June, 1900, Steinfeld met Nielsen near the mines and made an oral agreement to buy him out. On the 29th of June, 1900, this agreement was committed to writing; it appears at page 240 of the transcript. The parties to it are Steinfeld, The Nielsen

Mining and Smelting Company, parties of the first part, and Carl S. Nielsen and Mary Nielsen, his wife, parties of the second part. Two thousand dollars in cash was paid by Steinfeld and both he and the corporation obligated themselves to pay \$10,000 upon the sale of the mine.

The \$2,000 paid was the personal money of Steinfeld. The \$10,000 was also his personal obligation. The company, while by the terms of the agreement obligated jointly with Steinfeld to pay this \$10,000, was not legally obligated by reason of the fact that the contract had not been authorized by its directors, who had exclusive authority from the by-laws to incur indebtedness. Nielsen and a man named Lewis made a deed of certain unimportant mining claims in the district to Steinfeld, and Nielsen made a bill of sale to Steinfeld for the 300 shares of stock.

The findings of the court with respect to the purchase of the 300 shares of stock are as follows:

“* * * that in January, 1901, the 300 shares of said stock standing in the name of Carl Nielsen were transferred on the books of the company to the name of Albert Steinfeld, trustee.” * * * [Tr. fol. 1143.]

“* * * That the purchase price paid and agreed to be paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2000) dollars cash then paid, and the sum of ten thousand (\$10,000) dollars, agreed to be paid out of the proceeds of the working of said Old Boot or

Mammoth mine, or the proceeds of the sale of said mine, in the event the same should be sold before said sum should be paid out of the proceeds derived from the working of said mine. [Tr. fol. 1158.]

"* * * That said Albert Steinfeld took said 300 shares of stock in his name as 'trustee' and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company (said Silver Bell Copper Company during all such times and now, being the equitable and real owner thereof." [Fol. 1159.]

"* * * That the \$2,000 paid by Steinfeld at the time of the purchase of the said 300 shares of stock was the personal property of said Steinfeld, and that said Zeckendorf knew that Steinfeld had paid the same out of his personal money, for and in behalf of the corporation." [Fol. 1231.]

We invite particular attention to the foregoing findings, for the reason that the Supreme Court was under an obvious misapprehension, which we believe, and will hereafter argue, was responsible for their affirmance of the judgment in favor of the plaintiff on the second cause of action.

The Supreme Court, after stating the agreement of June 29, 1900, says:

"After this agreement was executed the 300 shares of stock were *thereupon* transferred on the books of the company to Steinfeld as trustee." [Fol. 1087.]

It was obviously misled by the language of the above quoted finding that Steinfeld "took" said 300 shares of stock in his name as trustee,

and inferred that at the time he took the stock, and as a part of the transaction of purchase, it was transferred in his name as trustee. The above quoted finding that the transfer was not made until January, 1901, occurs in the second finding among the preliminary facts, and without doubt escaped the attention of the Supreme Court. The undisputed evidence, and which is not in conflict with the official statement of facts, is this:

Prior to the Nielsen purchase, all of the certificates for stock were in the stock book undetached from the stub. Steinfeld detached the 300 shares from the stub, and sent the same to Nielsen, who endorsed it in the name of Albert Steinfeld, and returned it to Steinfeld, who put it in the stock book, where it remained until January, 1901.

In January, 1901, Zeckendorf came from New York to Tucson. He asked for the stock book and the minute book of the Silver Bell Copper Company and examined them.

He also asked Steinfeld for, and received the certificate for 300 shares of stock, which still stood on the books in the name of Nielsen.

In January, 1901, Zeckendorf, in his own handwriting, wrote out a certificate for 300 shares of stock in the name of Albert Steinfeld, trustee, and procured Curtis and Shelton to sign the same. He pasted in the stock book the cer-

tificate for 300 shares issued to Nielsen and procured the same to be marked "cancelled." On the back of the stub of the certificate issued to Albert Steinfeld, trustee, Zeckendorf wrote in his own handwriting to the effect that Steinfeld held those 300 shares of stock in trust for the corporation. Zeckendorf testifies that he did this after consultation with Steinfeld and upon Steinfeld's statement that he had bought the stock for the use and benefit of the corporation, and that he showed Steinfeld the writing on the back of the stub. [Fols. 91-2.] Steinfeld categorically denies this testimony, and states that he did not know that Zeckendorf had procured the certificate to be issued, or had written anything whatever on the stub, and that he did not see the writing on the stub for a long time thereafter. [Fols. 392 and 406.] Curtis testifies that Zeckendorf asked him to sign it and Zeckendorf and Steinfeld being partners, he assumed that it was all right, and therefore signed it.

Steinfeld says that in the early part of 1901 he first saw the certificate in his own name as trustee. He at once went to Curtis and asked him what it meant, and Curtis told him that it had been issued at Zeckendorf's instance. Steinfeld then insisted that he owned the 300 shares of stock as his personal property, he having paid for them, and also that he owned the English group of mines personally, he having paid for

them, and asked Curtis to consult Franklin in the matter.

The Franklin referred to had been for years attorney for the firm of L. Zeckendorf & Co., and the confidential legal adviser of Steinfeld. He had also been from its organization the attorney for the Nielsen Mining and Smelting Company.

Prior to this Steinfeld had written Zeckendorf that he contemplated going to Europe in order to secure this English title. In September, 1900, he did go to Europe, and while in Europe consummated a sale and procured a deed from the English corporation to the group of mines. He returned in December. (The Supreme Court says in its opinion that he went to Europe in December. This is an error.) Upon his return he saw Zeckendorf in New York. Steinfeld testifies that at such time he told Zeckendorf that he had at last succeeded in effecting the English purchase.

Zeckendorf denies this and claims that he knew nothing about it, although he admits that he knew that Steinfeld's chief purpose in going to Europe was to acquire the English claims.

The court finds that Steinfeld did upon his return from Europe tell Zeckendorf of the purchase. [Fol. 1176.]

On Steinfeld's private books the entry of the money expended in the purchase of the English titles shows that he purchased it as a personal investment.

The entries in these books are conclusive as to Steinfeld's intentions in these various transactions, and are consistent with the findings of both the District and the Supreme Courts. The evidence with respect to these books commences at folio 392. It appears that he kept in a private ledger a record of his investments and loans, and that it was his custom to make entries in it at the time of his various personal transactions. The ledger was alphabetically indexed; loans were kept under the head of the letter which was the initial of the name of the debtor. All "Investments" other than loans were indexed under the letter "I." He had at one time made a loan to the Nielsen Mining and Smelting Company of \$2000 (a different transaction from the \$2000 stock purchase), and such loan was kept under the letter "N," the initial of the debtor company. The entries with respect to the Francis & Volkert titles, the 300 shares of stock and the English titles were all under the head "Investments." These entries were made at the time of the respective transactions, and demonstrate that, whatever might have been the legal effect of these transactions, Steinfeld intended the outlay of the respective sums of money, not as advances or loans to the company, but as investments; in other words, as purchases of property. For instance, the entry with respect to the stock was made on July 3, 1900, and read: "Nielsen Min-

ing and Smelting Company, N (meaning Nielsen), stock, July 3, 1900, paid cash \$2000."

The court found that Steinfeld in making the purchases of the Francis-Volkert title and of the English title to the English group, intended that the property should be his own and not the property of the Silver Bell Copper Company, but did have the purpose and intent of offering to the company the opportunity to take over the title in consideration of its reimbursing him for his outlay in acquiring said title; that he expected the corporation would do this, but, should it not, he would then hold them as his own.

The findings as to the 300 shares of stock have been already quoted, and it will be observed, as will hereafter be argued, that the District Court did not in terms find that Steinfeld intended to purchase the stock for the benefit of the corporation, or to hold it unconditionally for the benefit of the corporation, and did not even by inference find that at the time of the purchase, he considered himself in making such purchase as an agent of the company to which he was loaning the purchase price.

The language employed, however, in the finding was such as in our opinion to mislead the Supreme Court.

To return to Steinfeld's version of the issuance on the 19th of January, 1901, of the certificate of stock in his name as trustee.

When Steinfeld insisted to Curtis that he owned the stock and the English group of mines individually, Curtis took issue with him, and as a result Curtis consulted Franklin, who, as has been stated, was the attorney for all parties interested, with regard to the ownership of both the 300 shares of stock and the English group.

As a result of this action of Curtis, Franklin told Steinfeld that under the circumstances of his purchases he held both the stock and the English group as trustee for the Silver Bell Copper Company.

Franklin, as appears by the evidence, took a very positive and determined stand in the matter and expressed himself in most emphatic language, and Steinfeld acquiesced. Steinfeld assumed, however, that if the mines and stock belonged to the company and not to himself, the company was indebted to him for the purchase price, and, acting upon this assumption, on the 19th of May, 1901, he wrote Curtis as follows:

"Mail late today, so won't go until morning. Enclosed find memo. disbursements Mammoth Company, showing \$9501.79 paid out. I think you better credit me on your books as trustee for disbursements in the matter, or, if you think best, will ask Franklin just how to make this entry. Now, though inasmuch as I am holding the same in trust for the company, it should so appear on your books. 'There is due me ten months' in-

terest averaging same at July, or you can send check for \$950.17 and also for \$200 as 10 months' interest on \$2000 Nielsen stock purchase, and I think I would open up another account as trustee crediting me with \$2000 deposited July 3, 1900."

The inevitable inference from this letter is that Steinfeld paid the \$2000 for the 300 shares of stock; that at the time of the writing of the letter he believed himself to be trustee for the company, and that he had not always believed himself to hold the property as trustee, for if so, why should the making of this entry upon the books of the company and his demand for interest have been deferred for one full year?

Upon the receipt of this letter, Curtis as treasurer of the company signed checks for the interest and sent them to Steinfeld, as requested.

After the receipt of such checks by Steinfeld he consulted with Franklin as to his rights; he was advised by Franklin that because of his relations with the company he had no legal right to make the purchases for his own benefit; but, on the other hand had no right to compel the company to assume such purchases; that it was his duty to give to the company an opportunity, at a meeting of the stockholders at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares, within a reasonable time to reimburse him for his outlays, and to take over the property if it so desired; and that if the company should not avail itself of his offer, Steinfeld could then

hold the properties as his own. After receiving such advice, Steinfeld returned the identical checks for the interest to Curtis. [Finding, fol. 1162.]

Franklin thereupon, and in order to put the matter in proper legal shape, prepared, as attorney for the company, the document denominated "Proposition of July 15th, 1901," which is set forth in full in finding XVII, page 479.

With respect to this proposition, Franklin testified:

"This is my work. It took me a number of days to prepare this. I wrote it nearly a year after, and it required my reviewing all the papers and contracts. I had to study the whole thing up again. Then I prepared this document which document I presented to Mr. Steinfeld, and he signed it. * * * So I said to Mr. Steinfeld, now, this contract—as to this, you cannot under any circumstances, claim the Nielsen stock as your own. That you must hold for this corporation even if they do not pay you back. That in no event, whether they pay you back or not, this 300 shares of the Nielsen stock you would have to hold as trustee for the corporation. But I said, of course, you can hold that as security for the money that is due. * * * When I explained the legal aspect of the thing to Mr. Steinfeld *he accepted my views as to the fact that he was a trustee and therefore it was that that proposition was drawn up.* * * * I have said everything Mr. Steinfeld said, because he was not my client in that matter at all. Mr. Curtis took the position himself that Mr. Steinfeld held those mines as trustee. * * * I stated what the law was and what the position of the parties

was because I was in a position to do so. I laid down the law on the subject and told them what they must do. That is what occurred. I drew up this paper and Mr. Steinfeld signed it."

The District Court finds that in making this proposition Steinfeld was not influenced by the advice given him by Franklin concerning his relations and duties to the company. [Fol. 1174.]

The Supreme Court finds, however, specifically, that in making this proposition Steinfeld acted under the advice of Franklin [fol. 1233], and we shall assume that such specific finding by the Supreme Court controls its general adoption of the findings of the District Court.

In this proposition Steinfeld recited in detail the circumstances of his purchase of the English group of mines and of the Nielsen stock and the interest in the mining claims held by him, and the terms under which the Nielsen stock purchase was made, and stated his willingness to sell and convey both the English group and the shares of stock to the company upon its paying him the money which he had expended in the purchase thereof, with interest, and upon its assuming and guaranteeing to carry out the terms of the Nielsen contract of purchase as well as the contract of purchase of the Francis-Volkert title, on or before October 15th, 1901, and would further agree in writing to do the annual assessment work on the mines. It was further expressed in

the agreement that if the company should fail to carry out the terms of the proposition, then Steinfeld would thereafter hold the property as his own.

In this proposition, Steinfeld states with respect to the 300 shares of stock, as follows:

" * * * At the time of the execution of this agreement (June 29th, 1900), I personally paid to said Nielsens out of my own money, the sum of \$2000, which was in payment of the quit-claim deed executed to me by them and Lewis, above referred to; and it was at the same time agreed by Mr. J. N. Curtis, your president and myself, that the three hundred shares of stock assigned to me by the Nielsens should be held by me in trust until the purchase price thereof, to-wit: Ten thousand dollars was paid by the Nielsen Mining & Smelting Company, as per the agreement, when said shares should be assigned by me to your company. XFol. 1168.]

"The 300 shares of stock in the Nielsen Mining and Smelting Company (now the Silver Bell Copper Company) however, I will, in any event, continue to hold under our joint agreement with the Nielsens in regard thereto, *unless you wish to disaffirm the said agreement as made by your president in regard thereto.*" [Fol. 1173.]

It will be subsequently argued that these statements by Steinfeld were inaccurate; that the first is, at most, an admission of a fact, to-wit: that the \$2000 was paid not for the stock, but for the mines, which is contradicted by the allegation in the complaint, as well as by the evidence and the finding; and that the second is no more than an admission made under such misapprehension.

That both mistakes were made by Franklin, who, when he drew the proposition, had an incorrect recollection of the true circumstances.

It will be observed that Steinfeld in the acquisition of the stock and mines had now expended sums of money which, with interest, aggregated \$15,192.45, and that he was obligated to pay the Nielsens \$10,000 and Francis and Volkert \$12,500. The Silver Bell Copper Company was under no obligations whatever in the premises. It had expressly reserved the right to determine at a later day whether it would obligate itself to refund to Steinfeld the moneys advanced by him. It was not a party to the Francis and Volkert contract, and although a party to the contract with the Nielsens, it had, through the action of Franklin and Curtis, declined to ratify its execution. The contract with the Nielsens was, as alleged in the complaint and shown by the evidence, an entire contract, and the refusal of the company to recognize Steinfeld's claim against it for \$2000 was necessarily a refusal to ratify the contract.

The Supreme Court finds that Steinfeld did not prevent the company from purchasing the English group of mines by any representation to the officers of the company or the board of directors that he intended to or would obtain the property for the company. [Fol. 1232.] Also, that the Silver Bell Copper Company went into the

possession of the English group of mines after its purchase by Steinfeld and was given by Steinfeld the right of working the same and treating any ores that might be taken from the same in the company's smelter [fol. 1233]; and that during all the times that the proposition of Steinfeld was pending the Silver Bell Copper Company was in possession of the English group and worked and operated it in connection with the Old Boot mine. In 1901 and at other times, Curtis, under the direction of Steinfeld, made various maps and reports of the property in which the English group was spoken of as part of the Silver Bell Copper Company's property. These maps and reports were sent to plaintiff and others and various efforts made by Steinfeld to sell the property as a whole, including the English group. [Fol. 1234.]

As a result of these efforts to sell, in April, 1903, an option upon the entire group was given to one George A. Beaton, who represented E. B. Gage and his associates, and, under this option the properties were sold on May 20th, 1903, to a corporation named the "Imperial Copper Company." One hundred and fifteen thousand dollars was paid in cash and four promissory notes were given, each for \$100,000, payable in three, six, nine and twelve months, with interest. About ten days prior to the consummation of the sale Gage and his attorneys came to Tucson, and the papers for effectuating the transfer were pre-

pared and the titles searched. Gage insisted that Steinfeld should personally guarantee the titles to the mines. He made this condition a *sine qua non*, and Steinfeld vigorously resisted incurring this further personal responsibility. Steinfeld finally yielded, and agreed personally to guarantee the titles for one year. It was provided that in the meantime the Imperial Copper Company should apply for patents upon the mines and pay the expense to the extent of \$375 a claim. If any of the applications should be adverse and litigation result, Steinfeld agreed to bear the expense.

Before coming to this understanding with Gage, Steinfeld took steps to put the entire series of transactions on a legal and satisfactory basis. The option which he had given on the 15th of July, 1901, and extended to September, 1902, had expired. There is no evidence that it had been extended nor is there any allegation to such effect.

He was still willing that the Silver Bell Copper Company should receive the benefit of all his labors and investments, but imposed certain conditions.

The matter was thoroughly discussed between himself on the one hand, and Shelton, Curtis and Franklin, representing the company, on the other hand, and, as a result, an oral agreement was arrived at prior to the consummation of the sale between Steinfeld and the directors of the company. [Finding XXV, fol. 1185.]

This agreement, in brief, was that Steinfeld would transfer to the company the entire title to the group of mines (opinion, Supreme Court, first appeal, 10 Ariz. at page 228) and the 300 shares of stock, and that in consideration thereof, the company would pay to Steinfeld \$18,117, which was the amount mentioned in the proposition of July 15th, 1901, with interest to date, at the rate of one per cent per month, and would assume his obligations with Francis and Volkert and Nielsen, and secure him upon his guarantee of the titles, and against all other obligations arising directly or incidentally out of the various transactions connected with the management of the entire property, and that the company would give him as security the custody and control of the entire purchase price, and that no dividend should be declared or distribution made of the proceeds until he should have been relieved from his personal liabilities in the premises.

Franklin, as attorney for the company, was instructed to draw an agreement between Steinfeld and the company, covering this oral understanding. He did this, and also prepared and wrote in the minute books of the corporation a proper resolution authorizing it. Steinfeld told Franklin that the agreement so prepared by him was too voluminous; whereupon Franklin drew a shorter agreement between the Silver Bell Copper Company, the Mammoth Copper Company

and Steinfeld, which was executed and which is set forth in full in finding XXV, ~~page~~^{Folio} 1183, and in the opinion of the court at folio 1091. The most important provision of this agreement immediately follows the recitals and is: "Now, therefore, in consideration of the premises and of one dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale *shall* belong to and be the property of the said Silver Bell Copper Company."

Franklin, Steinfeld and Curtis all testified, and it is the undisputed evidence that the draft agreement which was rejected as being too voluminous, embodied with precision and exactitude the oral understanding which had been arrived at between Steinfeld and the directors of the company. It is exhibit 133, and may be found at page 243 of the transcript.

After the sale to the Imperial Copper Company had been consummated, and on the same day the board of directors of the Silver Bell Copper Company met to take action upon the matter of the sale and the ratification of the company's agreement with Steinfeld and the Mammoth Copper Company. The minutes of the meeting recite that the president reported the fact of the agreement of sale and the terms thereof and also of the agreement between the Silver

Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company, guaranteeing Steinfeld from loss by virtue of his guarantee agreement with the Imperial Copper Company; they further recite that Steinfeld submitted for acceptance the proposition which had theretofore been submitted by him on the 15th day of July, 1901, and later extended until September 15th, 1902, with the additional provisions that the company should assume and pay a commission which Steinfeld had agreed to pay for negotiating the sale to the Imperial Copper Company, and should be indemnified against loss by reason of another asserted claim for a commission, and further that the company should indemnify him against loss, damage or expense by reason of his having guaranteed the titles to the mines sold to the Imperial Copper Company, as set forth in the guarantee agreement between the Silver Bell Copper Company, the Mammoth Copper Company and Steinfeld. The minutes further recite that thereupon a resolution was adopted accepting Steinfeld's proposition, and ratifying, confirming and approving the sale to the Imperial Copper Company and the agreement of indemnity made by the company with the Mammoth Copper Company and Steinfeld. After the execution of these agreements and the ratification of the same by the board of directors, the proceeds of the sale, including the promissory notes, were turned over

to Steinfeld under the agreement and by him deposited in a bank in San Francisco, except the sum of \$51,500, which had been attached in a suit by Franklin against the Silver Bell Copper Company, which was filed after the sale had been made to the Imperial Copper Company.

In the fall of 1903 Zeckendorf came to Tucson. He demanded an immediate dividend. Steinfeld refused to distribute the funds. Zeckendorf became very abusive [fol. 422] and insisted that the distribution be made. Steinfeld refused, claiming that he was entitled to the custody of the funds. Zeckendorf demanded the minute book. Steinfeld told him that he had sent the same to Francis J. Heney at San Francisco who had been retained by Steinfeld to defend in behalf of the company the Franklin and Burnett suits.

Steinfeld wrote to Heney for the book and was advised that Heney had gone to Washington and had taken the same with him. It does not appear that Zeckendorf at this time had seen a copy of the agreement of May 20, 1903, providing that all of the purchase price should belong to the Silver Bell Copper Company, and that Steinfeld should have the custody of the notes to secure him against the liabilities which he had assumed. It does appear that Steinfeld had written Zeckendorf immediately after May 20, 1903, enclosing him some agreements but Steinfeld was unable to recollect for certain whether this

particular agreement had been one of those enclosed.

Zeckendorf notified the Bank of California not to pay to Steinfeld the cash, part of the proceeds of one of the notes, and not to deliver to him the two notes which the bank had received from Steinfeld.

Steinfeld with E. S. Ives, his attorney, proceeded to San Francisco about the 1st of December, and demanded of the bank the money and the notes.

The officers of the bank advised them of Zeckendorf's protest against the delivery and asked for time to consult their attorney and to await Zeckendorf's arrival.

Two days after Steinfeld's arrival in San Francisco Zeckendorf arrived.

Steinfeld called at the bank and with his attorney reiterated his demand, and the officers of the bank promised him a definite answer at noon.

While there, Zeckendorf or his attorney telephoned to the bank, and a meeting was arranged for the same hour at the bank between Steinfeld and Zeckendorf.

Upon the return of Steinfeld and his attorney to the bank at noon, Steinfeld was served with a summons and complaint in an action instituted by Zeckendorf in which Zeckendorf alleged that by reason of the premises, Steinfeld owed him personally sixty odd thousand dollars and demanded judgment therefor.

In the meantime a warrant of attachment had been issued in this action and the money had been garnisheed in the hands of the bank.

A conference ensued in which Jesse W. Lilienthal of San Francisco, attorney for Zeckendorf, Zeckendorf, the bank officers, their attorney, Steinfeld and Ives were present.

Ives demanded of the bank the money and the notes.

The bank pleaded the writ of garnishment.

Ives asked what the bank would do if the garnishment was released by bond. Thereupon, Lilienthal came to the relief of the bank officers, and stated that it would be useless to give bond; that he was then preparing a complaint in a stockholders' suit in which Zeckendorf would be plaintiff and in which a temporary injunction would be asked, restraining the bank from delivering the money and notes to Steinfeld. Negotiations for an adjustment were then opened.

Zeckendorf and Lilienthal complained that Zeckendorf had never seen the minute book. Steinfeld and Ives agreed to give them the minute book (which was in the possession of Heney, then in San Francisco), and did so.

Negotiations were conducted for two or three days and the parties finally came to an understanding. Among other things, it was agreed that Zeckendorf should be elected a director. It was arranged that Lilienthal should commit the

terms of this understanding to writing and he did so. During these negotiations Ives stated to either Zeckendorf and Lilienthal, or to Lilienthal, that if Zeckendorf persisted in bringing the threatened stockholders' suit, asking that the contract of May 20, 1903, be avoided, Steinfeld would assent to its avoidance and would claim that he was entitled to such proportionate part of the purchase price as was paid for the English group of mines, and that such group was more valuable than the mines owned by the Silver Bell Copper Company, and the result might be a great financial loss to Zeckendorf. [Fol. 267.]

Lilienthal prepared the papers for a compromise. The draft is in evidence.

It was satisfactory in its substantial parts to all parties. One of its provisions upon which Steinfeld insisted, was that Zeckendorf should go to the Bank of California and tell them that Steinfeld had had the right in pursuance of the resolution and agreement which he (Zeckendorf) had theretofore not seen, to the custody of the money and the notes, and that his action had in no sense been unauthorized or a misappropriation.

Zeckendorf refused to make this statement to the bank until Steinfeld had returned to Tucson and had elected Zeckendorf director. Steinfeld was willing to sign the compromise papers, but insisted that Zeckendorf should immediately after their execution do him justice with the bank.

Zeckendorf refused, and the negotiations ended.
[Fols. 269-270, 426-7.]

Lilienthal immediately filed his stockholders' complaint [exhibit J, Tr. p. 251] in which he asked that the resolutions passed by the directors on May 20, 1903, be annulled and set aside, and that the agreement of May 20, 1903, be annulled and rescinded as fraudulent and against the rights of Zeckendorf. He obtained an injunction restraining the Bank of California from delivering the notes or the money to Steinfeld.

This action is still pending.

Zeckendorf swore in the action in which the attachment was issued that Steinfeld personally owed him the sixty odd thousand dollars, and he swore in the stockholders' suit that all of the money was the property of the Silver Bell Copper Company.

When he filed the suit for the injunction, he did not dismiss the suit in which the attachment had been issued or release the attachment.

Steinfeld did not have with him in San Francisco a copy of the agreement of May 20, 1903, between himself and the Silver Bell Copper Company.

Upon his return from San Francisco a special stockholders' meeting was called in the manner provided by the by-laws.

Steinfeld caused to be delivered to Zeckendorf a copy of the agreement of May 20, and on De-

cember 20th, 1903, served upon him a formal written notice which appears at page 106 of the transcript, in which he demanded the immediate dismissal of the injunction suit instituted in San Francisco, and in which he stated that upon such dismissal he would "comply fully and forthwith with the terms of the contract existing between me (himself) and the Silver Bell Copper Company, copy of which was given you (Zeckendorf) on Saturday, December 19, 1903."

It is the uncontradicted testimony of Steinfeld that his purpose in making this demand was that if Zeckendorf refused to dismiss the suit, he would grant the prayer of Zeckendorf's complaint and assent to the annulling of the contract of May 20th.

Zeckendorf ignored the notice.

The stockholders' meeting was held on the 26th of December at the office of Ives. Zeckendorf appeared with his attorney, the late Judge Barnes, and a stenographer. Curtis, Shelton, Steinfeld and Ives were also present.

The stenographer made notes of everything which occurred at such meeting.

The purpose of this meeting was to adjust the difficulties which had arisen between Zeckendorf and Steinfeld growing out of the disposition of the proceeds of the sale and the litigation which had been instituted by Zeckendorf in relation thereto. At this meeting a resolution was passed

rescinding and annulling the agreement of May 20th, 1903; and the resolution of the board of directors of the same date. In the resolution was set forth a copy of the agreement of May 20th, and the resolution of the board specifically referred to, and both were declared to be null and void. This action of the stockholders was taken with the consent and acquiescence of all the parties to the agreement of May 20th. At the stockholders' meeting and *after the passage of the rescinding resolution*, Steinfeld repeatedly urged Zeckendorf to dismiss the injunction suit, and Zeckendorf refused to do so.

After the adjournment of the stockholders' meeting the board of directors of the Silver Bell Copper Company met and adopted a similar resolution.

With respect to the stockholders' meeting, the court finds that Zeckendorf "in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and reso-

lution other than that relating to the indemnity agreement hereinbefore mentioned." [Fol. 1211.] At the directors' meeting held on December 26th, Steinfeld resigned as treasurer, and Curtis was elected in his stead.

After the directors' meeting and on the same day an agreement was executed between Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company, annulling and rescinding the resolution and the agreement of May 20, 1903, and Steinfeld thereupon repaid to Curtis, the treasurer of the Silver Bell Copper Company, the sum of \$18,117, which had been paid to him on the 20th of May, 1903. The latter sum, Steinfeld testified, was paid him as consideration for the execution of the agreement of that date. Steinfeld thereafter turned over to Curtis, the treasurer of the company, the proceeds of the sale held by him, except the sum of \$51,500, which had been garnisheed in a suit brought against the company.

On the 16th of January, 1904, the board of directors of the Silver Bell Copper Company met and adopted a resolution which recited that Steinfeld and the Mammoth Copper Company claimed the ownership of and right of possession of more than one-half the purchase price of the property sold, and claimed that the value of the property conveyed by them exceeded in value the property owned by the company; that it had been agreed

by and between Steinfeld and the Mammoth Copper Company and the Silver Bell Copper Company that the former should receive one-half of the said proceeds and the Silver Bell Copper Company the remaining half, less certain commissions and amounts paid out to attorneys for services rendered the company. The resolution provided that the distribution should be made in accordance with this agreement, and further provided the manner in which it should be made. There is no allegation in the complaint that this distribution was unfair, but at the first trial two experts, Staunton and Williams, testified as to the relative values of the Old Boot and English group of mines; at the second trial the parties stipulated:

"There being no question raised by the pleadings of the relative values of what is known as the "English group of mines" as compared with the remainder of the mines sold on the 20th day of May, 1903, to the Imperial Copper Company, it is agreed that the testimony and reports of W. F. Staunton and Percy Williams shall be stricken out and that the court shall disregard all other testimony relative to relative values, in so far as the question of such relative value is concerned, as justifying the actions of the board of directors and officers of the Silver Bell Copper Company in apportioning or giving to Albert Steinfeld or Albert Steinfeld and the Mammoth Copper Company one-half or any part of the proceeds of the sale above mentioned." [Fe lic 921]

On the same day another resolution was adopted by said board which provided that a dividend

of one hundred and eleven dollars on each share of the capital stock of the Silver Bell Copper Company should be paid to the shareholders of record. This dividend was based upon the distribution of the proceeds of the sale as provided in the preceding resolution. Thereafter a distribution of money was made in accordance with this resolution.

This suit was brought on behalf of the corporation to recover the moneys paid to Steinfeld upon such distribution, and the dividend upon the 300 shares of stock.

Upon the first trial judgment was rendered in favor of the plaintiff upon both causes of action.

The court found as a fact that neither the plaintiff nor Steinfeld nor either of the directors of the Silver Bell Copper Company intended at the stockholders' meeting held on December 26th, or at the directors' meeting immediately thereafter, to annul or rescind that portion of the agreement of May 20, 1903, whereby all of the purchase price of the mines was transferred to the Silver Bell Copper Company; that therefore it was immaterial for it to decide whether prior to May 20th Steinfeld had held the property for his own benefit or that of the company, and accordingly made no finding on the question of trusteeship.

Upon their appeal the defendants assigned as error this finding as being unsustained by the evidence. The Supreme Court did not pass upon

such assignment and reversed the judgment upon the ground that assuming the finding to be sustained by the evidence nevertheless, such misapprehension of the parties as to the effect of the rescission of the agreement of May 20th was as to the legal effect of the language used in the agreement, and did not arise from any misapprehension of fact, and that the annulling resolution passed by the stockholders referred to the agreement as an entirety, and even if passed under a mistake of law as to its effect, could not be corrected by a court of equity. The cause was therefore remanded for a new trial in order that the court might make findings as to the beneficial ownership of the 300 shares of stock and of the English group of mines prior to the agreement of May 20th, 1903. Upon the second trial, by stipulation of counsel, the cause was submitted upon the evidence taken at the first trial, except that certain testimony deemed by the parties immaterial under the issues, was eliminated. [Fols. 921-2.]

The language of the foregoing statement is mostly borrowed from the two opinions of the Supreme Court and its statement of facts. There have been added a few facts shown by the evidence not inconsistent with and tending to interpret and explain the facts found. In no case has any evidence been cited as to which there was either dispute or conflict.

This statement is applicable to both appeals, but they will be argued separately.

ARGUMENT.

First Cause of Action. Appellant's Assignments of Error.

Assignments third to ninth, inclusive, and the twelfth assignment, are to the effect that the Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in its findings of fact.

We believe it to be the settled law that this court will not look into the record to ascertain whether a finding of fact made by the Supreme Court is sustained by the evidence.

Eagle M. & I. Co. v. Hamilton, 218 U. S.
513.

The first assignment of error is simply that the Supreme Court erred in affirming the judgment of the District Court; and the second, that the Supreme Court erred in not reversing such judgment and remanding the cause for a new trial.

Under the prevailing practice, which is firmly established in Arizona, these two assignments will be disregarded as too general.

Newman v. Marks, 3 Ariz. 224, 28 Pac.
960;

Ward v. Sherman, 7 Ariz. 277;

Hardicks v. Rice, 11 Ariz. 401, 104 Pac.
1094;

2 Cyc. 997;

Sheperd v. Jones, 71 Cal. 223, 16 Pac.
711;

Indians' Bond Co. v. Shears, 24 Ind. App.
622, 57 N. E. 276;

U. S. v. Ferguson, 78 Fed. 103, 45 U. S.
Appeal 457, 24 C. C. A. 1.

If either of them be effective for any purpose whatever, then in no instance would any further assignment be necessary. They certainly afford counsel for appellee no enlightenment or suggestion as to the nature of appellant's contentions or of the points which he will make in his brief; and are probably too general under rule 21 of this court.

Deitch v. Wiggins, 15 Wall. 539;

Treat v. Jamison, 20 Wall. 652.

The eleventh and fourteenth assignments (the fourteenth being the last) raise a question of costs, and their consideration involves matters of practice arising under a local statute. We believe it to be the established rule that this court will not review the judgment of the Supreme Court of a state or territory upon such questions.

Copper Queen Aus. M. Co. v. Board of
Equalization, 206 U. S. 474.

This leaves for consideration but two assignments, the tenth and thirteenth. Such assignments are as follows:

"Tenth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not rendering judgment for the Silver Bell Copper Company, upon what is termed the first cause of action, viz.: the return of the money paid to Steinfeld under the theory that he was the owner of the English group of mines, for the reason that the evidence shows that he never at any time was such owner, but at all times held the said mines and all thereof as the trustee *constructive and expressed* of the Silver Bell Copper Company and that the said sums of money and all thereof were paid to the said Steinfeld without any consideration or right and in fraud of the rights of the stockholders of the Silver Bell Copper Company."

"Thirteenth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in deciding that Albert Steinfeld was *neither an express nor a constructive trustee* for the Silver Bell Copper Company, for the reason that the testimony shows conclusively that he was both an *express and constructive trustee for the Silver Bell Copper Company in the purchase of the English group of mines.*"

The question as to whether Steinfeld was an express trustee is a matter of fact, and to this extent these two assignments are the same as those preceding them.

The language employed in the tenth assignment which was in effect that the return of the money paid to Steinfeld under the theory that he was the owner of the English group of mines, was without any consideration or right "for the

reason that the evidence shows that he *never at any time* was such owner, but *at all times* held the said mines and all thereof as trustee," indicates that counsel for appellant have abandoned the contention upon which the plaintiff prevailed upon the first trial in the District Court, to-wit, that the agreement of May 20th was not effectually annulled or rescinded by the proceedings at the stockholders' and directors' meetings on December 26th, 1903; and we believe ourselves warranted in inferring that they will not urge such point before this court. The express statement in the assignment, that the ground for the alleged misappropriation consisted in the fact that Steinfeld never, at any time, was the beneficial owner of the mines, precludes the inference of an intent upon the part of counsel for appellant to argue before this court that Steinfeld, though at one time the beneficial owner of the mines, transferred them to the corporation by an instrument which is still effective.

These considerations, if accepted, would narrow the duty of this court to the inquiry as to whether, under the facts found, Steinfeld in purchasing the properties became a trustee thereof *in invitum*.

We furthermore submit that these two assignments are not even as to such one question specific enough to entitle them to consideration un-

der the general rule prescribing the requisites of assignments of error.

However, for the sake of precaution, we will submit to this court our views upon the various matters presented by appellant to the Supreme Court upon both appeals, treating first the question of alleged constructive trusteeship which, we believe, perhaps to have been properly assigned.

In the event that the court should accept our notion of the effect of appellant's assignments, the remaining portion of our brief need not be considered.

Defendant appellee asserts the following propositions :

I.

Steinfeld was not a Constructive Trustee Subsequent to September 15th, 1902.

II.

Steinfeld was at no Time a Constructive Trustee.

III.

The proposition of July 15th, 1901, and the failure of the corporation to avail itself of it, concluded the corporation from contending that Steinfeld was a constructive trustee.

IV.

Zeckendorf is estopped by his own personal laches from claiming a constructive trusteeship.

V.

The Proposition of July 15th was not Extended
Beyond September 15th, 1902.

VI.

Curtis' reports showing English group of mines as property of the Silver Bell Company and development of said mines by the Silver Bell Company are of no effect to establish plaintiff's contention of trusteeship.

VII.

Steinfeld not an Express Trustee.

VIII.

On May 20th, 1903, Steinfeld renewed the proposition of July 15th, but only with certain conditions and modifications, and the company in accepting such proposition accepted it with such modifications and conditions, and they were an essential part of such contract.

IX.

These modifications and conditions having proved unacceptable to Zeckendorf, and he deeming said contract to be for Steinfeld's interest, and it being conceded that Steinfeld as director voted for the execution of such contract with himself and Zeckendorf having brought suit as such stockholder in behalf of the corporation, alleging that such contract was fraudulent, and asking to have it annulled, it was proper for the directors to annul and rescind the same.

X.

The contract of May 20, 1903, between Steinfeld and the Silver Bell Copper Company being voidable at the election of the company, was annulled in its entirety by virtue of the resolution adopted at the stockholders' meeting on December 26, 1903, without respect to any subsequent action annulling or rescinding the same by the directors or officers of the company.

XI.

The distribution made in pursuance of the resolution of January 16, 1904, cannot be impeached in this action, for the reason that no injury has been alleged or proven. While a corporation may under certain circumstances elect to avoid a contract made by directors with themselves, a minority stockholder may not avoid such contract except upon allegation and proof of injury to the corporation by such contract.

I.

Steinfeld was not a Constructive Trustee Subsequent to September 15th, 1902.

It is submitted that the finding of the court with respect to Steinfeld's intention at the time of purchase, in conjunction with the transactions subsequent thereto, precludes the conclusion that he remained a constructive trustee after September, 1902.

The finding is number 13. It appears at page 477, folio 1160, and is as follows:

"The said Steinfeld in purchasing the said English group of mines from the said Francis and Volkert and from the said English owners did not purchase the same with the then intent that thereby they should become and be the properties of the Silver Bell Copper Company but at the times of the said purchases the said Steinfeld intended to take the properties as his own, but with purpose to offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would be and had been put to in acquiring the same, and said Steinfeld expected that the said Silver Bell Copper Company would take over the said properties, the said Steinfeld intending on his part that in the event the said corporation did not take over the said properties and so reimburse him he would keep said properties for and as his own."

The purchase of the mines by Steinfeld with such intent was certainly not any kind of implied fraud. It appears by the findings that the company had no funds with which to buy the mines.

That its stock was non-assessable, and that it was indebted beyond the amount authorized by its charter.

Furthermore, it was expressly forbidden by paragraph 235 of the Arizona Revised Statutes of 1887 to incur an indebtedness greater than its authorized capitalization.

Its agreement with L. Zeckendorf & Company, finding V, provided that the proceeds of all its matte, its only source of revenue, except borrowing, should be received by Zeckendorf & Company and applied to the existing indebtedness.

Under these circumstances Steinfeld invests his own money and time in the acquisition of the mines and assumes heavy personal responsibility, which the company did not share, and in doing this he harbors in his mind the intent to give the company the opportunity at its election to reimburse it and take over the properties.

We respectfully submit that we can assume that all the other facts were such as would ordinarily have sufficed to constitute him a constructive trustee, and that nevertheless he cannot upon any theory of equity be determined to have been such, or in any event to have remained such after September, 1902.

When advised by Franklin that as a matter of law he was a trustee he instantly acquiesced in such advice and admitted the trusteeship, and demanded not payment by the company but mere-

ly its obligation to reimburse him. The company thereupon, acting under the advice of Franklin, who in this matter was acting adversely to Steinfeld [finding, fol. 231.], refused positively to agree either to reimburse or to assume the obligation to Nielsen or Francis and Volkert. This act of the company, through Franklin, is destructive of a constructive trusteeship thereafter.

The company had no right in law or equity to hold off its election, to claim that the purchase was for its benefit, even for one day, after it had been apprised that Steinfeld claimed the ownership of the property. If the elements of a constructive trusteeship existed, it had the right then and there to demand of Steinfeld the recognition of its rights which involved the offer on its part; if not to reimburse Steinfeld, certainly to agree to reimburse him.

Franklin's attitude that Steinfeld was obligated to give the company an option upon the properties until a stockholders' meeting at which L. Zeckendorf should vote the stock of L. Zeckendorf & Company was entirely without merit. Franklin was the attorney for L. Zeckendorf & Company; and Curtis, the president of the corporation, was acting in the transaction for the interest of the corporation, and the finding is that he was not under the dominion of Steinfeld until after June, 1903. Steinfeld was under no legal or equitable obligation to give the company the

option which he did give it by his written proposition of July 15th, 1901. This proposition was given by him, as found by the Supreme Court, under the advice of Franklin [Finding, fol. 1732], and as we will hereafter argue, had it been accepted by the company, the contract so made could have been avoided by Steinfeld in a proper equitable proceeding. As a matter of fact, it was not accepted and was renewed by Steinfeld until September 15th, 1902. *During the period* of the extension of the option, the mine had been closed down and the concern was more heavily in debt than at any time in its previous existence. The English group of mines had been acquired, the attempted operation had been a failure, and the price of copper had depreciated. It was doubtful whether the mines and the 300 shares of stock were worth what Steinfeld had paid for them.

If Curtis or Franklin had deemed the acceptance of Steinfeld's proposition a benefit to the corporation they certainly would have advised Zeckendorf of it. The fact of the proposition appeared in the minute book of the corporation, and even though Zeckendorf may not have personally seen it, and such is the finding of the court, there was no concealment of it, and he did know that the English mines had been acquired, and as a member of the firm of L. Zeckendorf & Company, that such firm had not paid for them.

Certainly it must be conceded that under these conditions all equitable rights of the company lapsed with the option, and that from September 15th, 1902, Steinfeld was the absolute owner of the English group of mines.

The language of the court in *Twin Lick Oil Company v. Marbury*, 91 U. S. 587 at pp. 592-3, is particularly applicable to the case at issue:

"The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil wells. Property worth thousands today is worth nothing tomorrow, and that which would today sell for a thousand dollars as its fair value, may by the natural changes of a week or the energy and courage of desperate enterprise in the same time, be made to yield that much per day.

The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event and then decide when the danger which is over has been at the risk of another to come in and share the profit.

"A more inequitable demand, considering the facts of the case, was probably never addressed to a court of equity. If it was settled that there was no lien on the road to secure the state aid bonds, the case would not be any more favorable for the plaintiff. Having declined to take the risk of purchasing the property when it was doubtful whether the investment would entail a loss or yield a profit, it should not be permitted at this late day and in the light of subsequent events to reconsider that resolution. The profits, if in the end there are any, justly belong to the

purchaser who took the risk, and whose labor and capital have added largely to the value of the property. As was said by the court in *Wood v. Carpenter*, *supra*, it is impossible 'to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another.' "

Credit Co. v. Arkansas Cent. R. Co., 15 Fed., pp. 54-55.

One undertaking to procure by decree the creation of a constructive trust must act forthwith and must offer to pay the money which had been advanced by the party against whom the trusteeship is sought to be enforced.

Hoyt v. Latham, 143 U. S. 553; 36 L. Ed. 259;

Patterson v. Hewitt, 195 U. S. 309; 49 L. Ed. 214.

In the case of *Wenham v. Switzer*, 51 F. 351, an agent had purchased a mine on behalf of his principal, the purchase price being paid by the agent with his own funds, the agent having written to the principal requesting the ratification of the transaction within thirty days, and the agent having received no response, and having purchased the property in his own name, the court held that:

"Plaintiff should have ratified the action of the agent within a reasonable time, and failing to do so, the agent had a right to

maintain that the principal had left him to shoulder the responsibility he had assumed, and to treat the purchase as his own."

In the same case, reported in 59 F., page 942, at p. 947, the court says:

"The rule is fundamental that a party seeking the remedy of specific performance must show himself to have been ready, desirous, prompt and eager to comply with the contract on his part."

"Where the purchaser of land delays offering payment of the purchase money for five months after the stipulated time for payment, without any excuse therefor, his right to call for a specific performance will be thereby precluded."

Mix v. Baldue, 78 Ill. 215 (Syllabus).

To the same effect see:

Sandy River R. R. Co. v. Stubbs, 77 Me.

594; 2 Atl. 9;

Duffield v. Michaels, 97. Fed., 825;

Johnson v. Mining Co., 148 U. S. 360; 37 L. Ed. 480.

The test of a constructive trusteeship is the right of the party claiming to be the beneficiary, and therefore the true owner of the property to compel by suit in equity the party holding the legal title to convey or assign the corpus of the trust property.

Pomeroy Eq. Juris., Sec. 1058.

The company could at no time have maintained such a suit. It would have been necessary therein that the company allege and prove that it was ready and able to pay Steinfeld the purchase price.

As has been argued, not only did the company not have the money to reimburse Steinfeld but it had not the legal power to obligate itself to pay Nielsen or Francis and Volkert, or to compel Steinfeld to convey to it the properties and to accept in consideration therefor the acknowledgment of an indebtedness by the company to Steinfeld or to L. Zeckendorf & Co. for the purchase price. Such an indebtedness would have been *ultra vires*.

A court of equity will not lend its assistance to enable a corporation to commit an *ultra vires* act even to remedy actual fraud.

This point was *expressly* decided by this court.

The railroad company is plaintiff in this action and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the titles to lands received already, and in the possession and ownership of the company, void on the principle that they had no

authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company violating the law, and enabling the company to do that which the law forbids. * * *

"We are urged to consider that if this decree is affirmed, dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such a question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. * * *"

Case v. Kelly, 133 U. S., p. 21, at pp. 28, 29.

We deem this case conclusive of this litigation.

If Steinfeld had refused to sign the proposition of July 15, 1901, the corporation would have been without remedy, unless as stated, it had instituted an action to compel the specific performance of a contract, the performance of which by itself would have necessitated an increase of its indebtedness beyond the limit of its charter.

A complaint setting forth these facts would have been demurrable.

Case v. Kelly, *supra*.

II.

Steinfeld was at no Time a Constructive Trustee.

We believe it to be a correct statement of the law, that unless it was Steinfeld's duty to pur-

chase the mines for the company, he had the right to purchase them for himself, and that a constructive trust may only be imposed against one who buys for himself property which it was his duty to buy for another.

“But if he did not originally buy the coal for the purpose of selling it to the company *and did not buy it at a time when it was his duty as treasurer to buy coal for the company*, it is difficult to see how he can be treated as an agent of the company in making the original purchase.”

Parker v. Nickerson, 137 Mass. 487, at page 497.

This doctrine is extensively discussed in the case of Steinbeck v. Bon Homme Mining Co., 152 Fed., p. 333:

In the course of the opinion in that case, the court says:

“The test of the existence of a constructive trust of this nature is the fiduciary relation, and the betrayal of the confidence reposed under it to acquire the property or interest of the correlate, and, in the absence of either of these indispensable elements, no such trust can arise.” * * * (Page 338.)

“A constructive trust of this nature is the creation of a court of equity. But such a court never raises it unless the holder of the title has been guilty of some breach of duty; for ‘a court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. A purchaser

chargeable with such a trust is a trustee *ex maleficio*, or a trustee *de son tort*, and, if he has been guilty of no wrong, he is no trustee * * *"

"The only trust with which the property could be charged was therefore a constructive trust arising from the fiduciary relation, and, as he was guilty of no betrayal of confidence, no abuse of his fiduciary relation, and no breach of duty in acquiring or holding it, and the failure of the corporation to secure it resulted only from its refusal to accept his offer to convey it, his title was not chargeable with any constructive trust for the benefit of the corporation." [Page 343.]

The testimony in support of appellant's contention that whatever may have been Steinfeld's intent in purchasing the English group of mines, the law under the circumstances, would not permit him to purchase them for his own benefit, may be grouped under three heads.

A. The value of the English group of mines to the Silver Bell Copper Company, Steinfeld's knowledge of their value acquired by reason of his relationship to the Silver Bell Copper Company, and Steinfeld's domination of the Silver Bell Copper Company.

B. The fact that Steinfeld shut the Old Boot mine down in order to acquire the English group of mines.

C. Steinfeld's letters to Zeckendorf with respect to the desirability of purchasing the English group of mines and his intentions relating thereto.

These will be considered *seriatim*.

A.

Steinfeld's relations to the Silver Bell Copper Company were not such under the circumstances as to impose upon him the duty of purchasing the mines for that company.

Before examining further into the law on this question, the court is invited to view the facts from the standpoint of what was the nature of the advantage which the ownership or control of of these mines would give to the defendant company.

It cannot be asserted that the ownership of the English group of mines was essential to the purposes for which the defendant corporation was organized.

A corporation organized for the purpose of operating or buying and selling mines may operate and develop the mines which it owns without ever acquiring any additional mines. A certain pass through a mountain gorge may be essential to the uses of a corporation organized to operate a railroad between two points on opposite sides of such pass; but, however useful and advantageous the ownership of an adjoining mine may be, it cannot be asserted that such ownership is essential to the purposes of a mining corporation.

The Old Boot group of mines, separate and distinct, had a definite ascertainable value. The English group of mines, separate and distinct, had a definite and ascertainable value. The two

group of mines together had a value largely in excess of the sum of the value of each if sold separate and apart.

This increment of value arising from a sale of both as one group pertained as much to one group as to the other, and the ownership by the Silver Bell Copper Company of the English group of mines was no more essential to it than was the ownership of the Old Boot essential to the English owners. Both groups were advantaged by the mines being sold in bulk.

Granted that Steinfeld acquired from the workings of the Old Boot his knowledge that the Old Boot would be worth more money if sold with the English group of mines, *still the advantage to the Old Boot thus made known to Steinfeld was the increase in value of the Old Boot group if sold in conjunction with the other group.*

If Steinfeld, having purchased the English group of mines, had refused to sell them in conjunction with the Old Boot unless he (Steinfeld) should receive \$400,000 for the English group, thus appropriating to himself all of the increment, then the argument of the plaintiff might be apt, but so long as Steinfeld was willing that his mine should be sold in conjunction with the Old Boot, thus giving the Old Boot its share of the increment, it must be conceded that Steinfeld undertook to take no advantage of the proprietors of the Old Boot.

The defendant company was to be benefited, and was in fact benefited by the acquisition of the English group, by a party who was willing to sell it in conjunction with the Old Boot and thus assure to the Old Boot group its share of the increment.

Steinfeld acted in absolute good faith with the defendant company.

The purpose of the acquisition of the English group was to enhance the value of the Old Boot group. The increment was a direct result of the two groups being sold as one.

Steinfeld purchased the English group and forthwith offered the two groups as one, thus without any outlay or expense to the Old Boot, assuring to it the advantage which it sought. More cannot be asked of Steinfeld, and no court should grant more.

The plaintiff must concede that the result of Steinfeld's speculation, of Steinfeld's disbursements, of Steinfeld's assumption of liability to the Francis-Volkert people, was a distinct enhancement of the value of the Old Boot group of mines. They must admit that Steinfeld from the outset, without demur, gave to the Old Boot group of mines this advantage, and that the result was a sale of the Old Boot mines for one-half of \$515,000, which half was nearly double what the defendant company had been willing to sell the Old Boot group of mines for before Steinfeld's

acquisition of the English group. [Folio 319-320.]

The contention that Steinfeld in addition to giving this increment to the Old Boot, should also give to it the other properties which he had purchased at his own risk with his own money is utterly without merit and not founded on any principle of equity.

Nature of Steinfeld's Control of the Corporation.

Steinfeld was not a director in the corporation until January, 1901. He was not individually a stockholder until long after that time.

The firm of L. Zeckendorf & Co. was at all times an extensive creditor of the corporation. By withholding credits it could force a suspension of operations. Steinfeld as managing partner of the firm of L. Zeckendorf & Co., had the say as to whether additional credits should be extended to the corporation or not.

The relation of creditor and debtor is not a fiduciary one. It is a purely business relationship.

The court has found that while Steinfeld was not an officer or director of the company, he as a matter of fact "*as managing partner of L. Zeckendorf & Co.*, assumed to be the general manager of said company, and assumed the power of directing its affairs and of controlling all of its action." [Folio 1151.]

And the court further finds,

"That said Albert Steinfeld acquired such information (information with respect to the tendency of the ore bodies and the necessity of acquiring title to the English mines) because of the fact that he was acknowledged and conceded to be the actual manager of said Nielsen Mining and Smelting Company, and because of his assumption of such power and of such position" [Folio 1157.]

Therefore, his knowledge being acquired by virtue of his acknowledged and assumed rights as creditor, and his dominion being that of creditor, he did not acquire such knowledge by reason of any fiduciary relation toward the corporation.

The Corporation was Unable to Buy.

In brief, the situation is this:

The Nielsen Mining and Smelting Company owns a group of mines. The working on such mines shows depth. It is reasonable to suppose that other adjoining mines with similar surface showings will have a like depth. The Nielsen Mining and Smelting Company has no money. The firm of L. Zeckendorf & Co. is stockholder and creditor of company, and as such, necessarily knows the result of its workings.

The firm of L. Zeckendorf & Co. has loaned upwards of \$50,000 to the company. From the workings in the mines L. Zeckendorf & Co. in common with the other stockholders and the directors of the company receive information as to

the value of adjoining mines which the owners of such mines do not have. From this condition appellant asks the court to conclude that the firm of L. Zeckendorf & Co. *must loan* to the Nielsen Mining and Smelting Company enough money to purchase the adjoining mines.

There is no logic in such contention. L. Zeckendorf & Co. could not be under obligation to advance money to the company, and were at liberty to purchase the adjoining mines for themselves.

The question as to whether Steinfeld was under obligations to the firm of L. Zeckendorf & Co. to purchase for the benefit of the copartnership and not for his own benefit presents a different issue which is not material in this case.

In no recorded case has a constructive trust been decreed where the person claiming to be beneficiary has not been ready, competent and able to make the purchase for his own good. The essence of the constructive trust is that the alleged beneficiary wanted to make, and would have made the purchase. The person exercising the fiduciary relationship is barred from making the purchase solely because he should not have interfered with the right of his principal to make the same. The inability of the principle releases forthwith the agent from any fiduciary obligation.

In the case at bar the Nielsen Mining and Smelting Co. had no money and could not purchase anything. Its stock was all paid up and

non-assessable. It could not raise money except by incurring indebtedness. By its charter its indebtedness was limited to \$25,000 and its actual indebtedness far exceeded that sum. It was helpless and hopelessly unable to make the purchase; and under such circumstances its stockholders, directors, servants and employees were each and all free and at liberty to purchase each on his own account that which the company of necessity could not purchase for itself.

Even if the corporation had had funds sufficient to make the purchase under the facts as they existed Steinfield could have purchased for his own benefit.

A stockholder or director of a corporation is not bound to acquire property for the benefit of the corporation which may be valuable or important to it in the conduct of its business; and such stockholder or director may compete with the corporation for the acquisition of this property, and it is immaterial that knowledge of the situation was gained by such stockholder or director through connection with the corporation unless the corporation had a then existing interest in the property in question or had an expectancy in such property growing out of an existing right *or unless the action of such stockholder or director in acquiring said property would balk the corporation in effecting the purposes of its creation.*

No expectancy of value springs from the fact that the corporation was negotiating for or endeavoring to purchase the property, unless the corporation had an existing right in the same at the time of such negotiations, or unless the ownership of such property by the corporation is essential to effect the purposes of its creation, *or unless the acquisition of such property by the stockholder would depreciate the then value of the property owned by the corporation.*

It is confidently asserted that the above is a correct and faithful statement of the doctrine of constructive trusteeship as enunciated by writers of text books and the authorities.

A most instructive case on this subject is that of
Lagarde v. Anniston, 28 So., p. 199; 126
Ala. 496.

In that case the defendants were president and secretary of the plaintiff corporation.

The corporation was organized for the purpose of quarrying limestone and the manufacture of lime and it had for a long time been negotiating for and endeavoring to purchase certain lands on which a valuable limestone quarry was located; in 1896 it succeeded in purchasing an undivided one-third interest in said lands. The remaining two-thirds were owned by separate parties, each owning an undivided one-third interest therein.

The corporation had negotiated with one of

them named Christopher; but Christopher being unable to convey a good title to his undivided one-third interest, in January, 1896, entered into a contract with the corporation to convey such interest when he should be able to make good title thereto, and leased his one-third interest to the corporation.

The corporation had at various times negotiated for and endeavored to purchase the remaining one-third interest which was owned by a man named Martin.

The lands lay very near other lands owned by the corporation, and their chief value consisted in a limestone quarry, and it was greatly to the corporation's interest to acquire the other two-thirds.

In the year 1897 the defendants became directors of the corporation, one of them being elected president, and the other secretary and treasurer, and continued to hold such positions until 1899.

By reason of their official connection with the corporation they exercised control and supervision over its business, and in that way became acquainted with all the properties owned by the corporation.

The defendants while holding the offices of director, president and treasurer, and without the corporation's knowledge or consent, purchased from Christopher his one-third interest, taking a deed thereto in the name of a third party named

Blunt, and they thereafter procured the same man Blunt to purchase from Martin his one-third.

It was by and through the connections of the defendants with the corporations that they learned of the existence of the limestone quarry located on such lands.

The prayer of the complaint was that the defendant be decreed to hold the title to the undivided two-thirds interest in trust for the corporation, and that upon the payment into court of the amount paid by the defendants for such two-thirds interest they be decreed to convey the same to the corporation.

The demurrer to the complaint was overruled, from which the defendant appealed.

The court held that with respect to the one-third interest acquired from Christopher the defendants held title as trustee by reason of the fact that the corporation had contracted with Christopher to purchase the same, and had a lease upon the same; but as to the one-third interest acquired from Martin the defendants were the absolute owners.

It is rare that a case so on all fours is findable. The court says (126 Ala., p. 502.):

“The duty is only co-extensive with the trust, so that in general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy out

of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation.

"Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit enterprises or investments which though capable of profit to the corporation, have in no way become subjects of their trust or duty. * * *"

An equally instructive case is that of
Trice v. Comstock, 121 F. 620.

Upon a superficial reading, the doctrine of this case might appear to be adverse to that contended for by defendants; but, upon a careful reading it will be found to be conclusive in support of the proposition as laid down.

In that case the defendant had been employed and paid by the plaintiffs as their broker to sell to a third party certain property upon which the plaintiffs believed themselves to have an option at a much lower price than that at which it was designed to sell. The defendant having thus become advised of the great value of the property and of the price at which it could be purchased, and the option which the plaintiffs had having turned out to be invalid, purchased the property from the owners for himself; and the court held him to be trustee for his original employers.

A careful reading of this case, however, will show that it turns entirely upon the proposition

that the very purpose of the agency was the purchase of this particular property by the defendant, and it was the fact that the acquirement of this property by the defendant balked the very purposes of the agency which impelled the court to hold him as trustee. The defendant had been employed and paid by the plaintiff to procure a purchaser for this property from the defendants at an enhanced price.

The court held that no agent, attorney or trustee

"Shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created."

and cites a vast array of authority.

"It forbade him to use them for his sole benefit, or to prevent his principals from obtaining the objects of the agency. But forbids him 'to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purposes for which the agency was established.'"

There was no concealment on the part of Steinfeld. His letters to Zeckendorf teem with the importance of purchasing the English group of mines. Curtis knew the importance of it; Nielsen knew the importance of it. At the time he purchased the English group Steinfeld did so with the knowledge of Zeckendorf. He had frequently suggested to Zeckendorf the advisability of pur-

chasing these very claims and at no time did he (Zeckendorf) suggest or offer to participate in the purchase.

Steinfeld actuated by a desire to promote the common good invested thousands of dollars of his own money, and by his own foresight and experience and after a trip to England for the purpose of securing titles, made the purchase on his own account.

The English group of mines, although in the vicinity of the defendant company's mines, was in no way necessary to the operation of the latter or to the business of the defendant company.

Steinfeld himself, in addition to the actual cash that he paid out of his pocket, became personally liable for more than \$20,000. He was in no sense dealing with the company's property nor as agent for it, but made a fair and full disclosure at all times to his co-directors; told them he had been to England, what he paid for the titles, what he had yet to pay.

Not only was the transaction in its entirety highly beneficial to the company, but it did not and could not result in the slightest injury to it. Steinfeld had purchased for himself property that was not necessary for the company's business, that the company had no power, legally, to purchase; that the company could not purchase, even if it had such power, its treasury being empty, and had voluntarily permitted the company to

profit by his ability to sell the two together at a greater price than could have been realized if sold in separate parcels.

Steinfeld cannot be said to have purchased a competing business, because one mine cannot be said to compete with another, for the reason that neither has "customers" in the business sense of the word, as the output of a mine is sure of an instant sale at the market price. Even if it had been competing, however, he would not have been liable to the company for profits.

Barr v. Pittsburgh Plate Glass Co., 57 F.
86-97.

An examination of all authorities will show that in order to create a constructive trust, it is necessary either that the party who wishes to enforce the trust should have had a then existing interest in the property *or that the action of the stockholders or directors would balk the corporation in effecting the purposes of its creation.*

Many authorities hold that it is necessary that the corporation should have a then existing interest but this doctrine has been qualified. (See *Trice v. Comstock, supra.*) The qualification, however, extends only to cases where the acquisition of the property by the *stockholder or director would balk the corporation in effecting the purposes of its creation.*

Neither of these elements exists in the case at bar.

Referring to the doctrine laid down in *Trice v. Comstock* the Supreme Court says:

"We think the rule as thus stated is as broad as the authorities will sustain. * * * It should not be overlooked that at the time of the acquisition of the titles to the English group by Steinfeld the Silver Bell Copper Company was indebted to L. Zeckendorf & Company in an amount exceeding its capitalization, with no available resources which could be utilized to effect a purchase of the English group. Steinfeld did not prevent the company from making the purchase by any representation to the officers of the company or to the board of directors that he intended to and would obtain the property for the company. It is urged by counsel for appellant that he was in a situation to have made the purchase on behalf of the company by personally advancing the money needed for that purpose, or by obtaining the same from the firm of L. Zeckendorf & Company. The answer to this is, that to hold that an officer or director of a corporation is under any duty to such corporation to loan money or to purchase out of his own funds property for the use of the corporation would be enlarging the duty of an officer or director of a corporation beyond any point to which the law of trust has ever gone."

B.

The shutting down of the mine by Steinfeld was not such an act as would give rise to a constructive trust.

The allegations in the complaint with respect to the shutting down of the mine are:

“He (Steinfeld) ordered the said Mammoth mine to be closed down and all work thereon to be stopped in order that the English group of mines so-called and the Francis and Volkert titles might be purchased at a nominal sum.” [Folio 752.]

“Said mines were closed down by said Albert Steinfeld solely and exclusively as above alleged, for the purpose of enabling him, as the agent or representative of the Nielsen Mining and Smelting Company to acquire said English group of mines and the Francis and Volkert titles thereto, and of getting rid of said Carl Nielsen.” [Folio 755.]

“Steinfeld was enabled to purchase said mines at such reduced price solely and wholly because of the fact that said mines were shut down and said workings thereon stopped, to the great loss and damage of said Nielsen Mining and Smelting Company.” [Folio 758.]

“That before closing the mines he visited them and learned the truth of the statements made by Curtis as to the necessity of acquiring them ‘so that all of said mines * * * could or might be sold as one group.’ ”

That the Old Boot mine was put in operation, and again worked “in the fall of the year 1900; that by said time the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot mine were very much less than at the time said mine was closed down by said Steinfeld, as above alleged, and in consequence thereof, said Nielsen Mining and Smelting Company sustained a great damage, in fact, a damage far in excess of the price paid by Steinfeld for said mines.” [Folio 759.]

With respect to these allegations, the court finds as follows:

"That said Mammoth or Old Boot mine during the fall of the year 1899, and up to the time of the closing of said mine in the spring of 1900, was being worked at a substantial profit." [Folio 1154.]

"That Steinfeld closed the mine down, his controlling purpose in doing so being to obtain from Nielsen for the corporation the 300 shares of stock * * * and in order that the English group of mines * * * might be purchased at a nominal or small sum, and said mine was not shut down because said mine could not have been worked at a profit; for the same could have been worked at a substantial profit, and that all of the said acts and purposes of Steinfeld were communicated by him to the said L. Zeckendorf at the time the said acts were done or the said purposes formed." [Folio 1155.]

"That after acquiring said Francis and Volkert titles to said mines, and prior to his going to Europe, said Steinfeld directed that the Old Boot mine be again put in operation and worked. * * * That by the time said mine was reopened the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot mine and adjoining mines were very much less than at the time said Old Boot mine was closed down by Steinfeld in the spring of 1900 as above found."

"That in January, 1900, said Steinfeld caused the development work upon said mine to be stopped. The smelter, however, was run until some time in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and substantially all of the ore which had been developed prior thereto, were exhausted, and that if said development work had not been stopped by said Steinfeld and had been continued

during the operation of said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied, and in consequence thereof, said Silver Bell Copper Company sustained great damage.' [Folio 1160-61.]

Particular attention is invited to the finding that Steinfeld directed the mine to be re-opened *before he went to Europe and purchased the English titles.*

The English titles were what he chiefly wanted. He regarded the Francis and Volkert titles as comparatively unimportant, as he wrote to Zeckendorf "the thirteen claims were jumped by Volkert and Francis, but I never considered their titles to be good or to be depended upon." [Folio 686.]

The findings should be considered in the light of the entire situation as shown by the evidence.

We appreciate that this court will not reject a finding of fact on the ground that it is not sustained by evidence, but believe that if justice requires it will look into the evidence with the view of determining how a finding should be construed.

The court finds that during the fall of 1899 and up to the closing of the mine in the spring of 1900 it was being operated at a substantial profit. In a literal sense that is true. The court does not find, however, what had been the cost of developing the ore, which was treated during such time,

and of preparing for such few month's profitable run, Furthermore, there is no finding as to how long the mine could have been operated at a profit. On the contrary, the finding is that all the ore was exhausted in February, so that in January, when Steinfeld ordered the shut down, there was in sight only enough ore to run the smelter for about one month.

It is true that the court also finds that if development work had been continued during the operation of the smelter "sufficient ore would have been developed to have kept the smelter continuously supplied."

Certainly the court could not have intended by such finding to forecast the quantity and quality of ore which such development work would have disclosed. It must have intended that such would have been the case provided there had been ore in position to be exposed regularly as the development proceeded. To give the finding any other meaning would be to infer that the court had embarked upon a sea of speculation and conjecture as to what was the value of the ground not in sight. A fifty foot streak of lean or barren ore—such are found in the best of mines—would have interrupted the continuity of the ore supply, necessitated at least a temporary shut-down of the smelter, and have presented to Steinfeld the question whether, by pressing into such lean material with his development, he should speculate with

the funds of L. Zeckendorf & Company as to when, if ever, a pay streak would be encountered.

The fact that Steinfeld operated the smelter until the supply of ore was exhausted shows that he had no purpose to hamper the company's finances.

As a matter of fact, the mine was in no condition to be run. It is not good business or profitable to operate a smelter under less than six month's ore supply. A few month's run may be profitable in the sense that during such few months the receipts are greater than the expenses, but the general result is a loss unless the run be continuous month in and month out, year in and year out.

The operation of this property considered as a whole shows that it was always operated at a loss. Nielsen commenced even, and turned it over to the company because he had become involved in debt. The company started owing Zeckendorf & Company about twenty thousand dollars; this indebtedness as appears from the books increased steadily and regularly until it had become one hundred and twelve thousand dollars at the time of the sale. The court's findings, therefore, mean, and mean only:

First: That the smelter was operated profitably from September to February;

Second: That it could have been run profitably longer if development work had been continued and *if such development work had continuous-*

ly disclosed ore as valuable as that which was then being treated."

To infer that the court intended to find that there was as a matter of fact sufficient valuable ore under the ground in a continuous body to keep the smelter continuously supplied would be to create a finding not only not sustained, but contradicted by the evidence, and as has been said, to place the court in the attitude of having assumed to venture into the field of speculation and conjecture.

Curtis knew more about the mine than anybody else; he said:

"The reason for shutting down the mine in December, 1899, was that the mine was in a very bad condition. There was no ore in sight and Mr. Steinfeld was having considerable trouble with Mr. Nielsen, and he had finally decided to shut it down." [P. 118, fol. 282.]

Again,

"The shut down of the mine was for two reasons. One was the trouble with the Nielsens; and the other was the running in debt under Nielsen's management. The thing was running into debt like the mischief." [P. 152, fol. 366.]

And again,

"I began to run in September, 1900, and continued to run without cessation until February, 1902. Yes, that is the mine not the furnace. A great deal of that time, of course, was the development because the furnace was not running for want of ore. The time we were not running we put the ore on the dump; afterwards we hauled

it down to the furnace and ran it through the furnace." [Fol. 366-7.]

Of date June 29, 1900, immediately after getting rid of the Nielsens, and before the English purchase, Steinfeld wrote Zeckendorf that he had sent a surveyor to the mines to do certain work and that,

"After ascertaining this information, we will at once start development work, and I believe in sixty days we can be ready to start the furnace again." [P. 277, fol. 660.]

A month later, on July 25, 1900, he writes to Zeckendorf:

"I am in hopes that within sixty days we can start the furnaces and repay ourselves for all advances." [Ex. 56, p. 280, fol. 667.]

It was a case of hope deferred. After six months had passed and on December 19, 1900, he is still writing Zeckendorf:

"I shall go out to the Silver Bell in the morning and try to arrive at some plan of action to start smelters" [Ex. 58, p. 281] and eight months later, on August 2, 1901, he again writes:

"I only regret the smelter has been closed down so much." [Ex. 60, p. 281.]

It was not until September 25th, 1901, or 15 months after he started his surveyor out as the initial step of resuming work that he is able to report to Zeckendorf:

"The indebtedness has grown very much since last spring, but now the smelter has resumed, with

large ore reserve on dumps, and I am in hopes it will soon be materially reduced. The property is for sale to the first legitimate buyer." [Ex. 63, p. 281.]

In the light of these letters, and of Curtis' testimony, it seems difficult to assume that the district judge could have intended to have found without a qualification as to the contingency of the ore being there, that if development work had not been stopped in January, 1900, "sufficient ore would have been developed" in the one month prior to February, 1900, when all ore was exhausted, "to have kept the smelter continuously supplied."

The Fall in the Price of Copper is Immaterial.

The finding is, that at the time the mine was reopened, the price of copper had so depreciated that the profits were less than at the time of the shut down.

The evidence with respect to the depreciation of the price of copper, and upon which the finding is based, consists exclusively of one letter from Steinfeld to Zeckendorf dated December 31st, 1901, and one reference in Curtis' testimony. Steinfeld wrote 'I am somewhat alarmed at the condition of the copper market and only hope that this is temporary. * * * I figure at 12½ cents market we can make a stand off. * * * This sudden change in the market is a great disappointment.' [Folio 675.]

Curtis' testimony is "there was no ore in sight in September, 1900. When we shut down in February, 1902, the price of copper was about 10½ or 11 cents. We could not smelt the ores there with the plant we had at a profit. There was bullion in transit at the time we shut down. On December 31st or January 1st there was bullion in transit. I wrote off on the books twenty-six thousand dollars loss on that bullion." [Folio 373.]

It appears, therefore, that although Steinfeld as found by the court shut down the mine for the purpose of acquiring the English group of mines, he changed this purpose in June, 1900, when he sent his surveyor to locate the ore bodies [~~finding~~ folio 660.] thus taking the necessary steps preliminary to the re-commencement of development work. The purpose, therefore, found by the court could not have been very resolute or sinister, and the damage to the company by reason of such shut down while "substantial" or "great," whatever those words may mean in figures, was only such as was occasioned by a six months' cessation of development work.

It is submitted that the foregoing facts are wholly insufficient to constitute a constructive trust. As has been before stated a constructive trust cannot be founded except upon the violation of an obligation. There is no finding or evidence that Steinfeld knew or believed that the contin-

uance of development work would have had the effect to supply the smelter continuously with ore, or that he anticipated the depreciation in the price of copper, or that he knew or believed, or had any reason to know or believe, that the stopping of development work would deprive the company of profits or do it any damage.

Furthermore, development work costs money. The company was largely indebted to Zeckendorf & Company. Its only means of repaying such indebtedness were by turning its ore into money or selling the mine. To have continued development work, thus investing the asset consisting of the ore in sight in a speculation retarded the diminution of Zeckendorf & Company's indebtedness. There was no obligation on the part of Zeckendorf and Company to extend this further credit, and Steinfeld as the manager of such firm was in no sense guilty of a wrong in not doing so.

It must always be borne in mind that it was L. Zeckendorf & Company, as found by the court, who ordered the mine shut down, and that Zeckendorf cannot on behalf of the corporation and against the will of all its stockholders assert a constructive trusteeship by reason of the act of his own firm. L. Zeckendorf & Company could there and then, as creditor, had Steinfeld been animated by any fraudulent intent, have sued the company for its indebtedness and purchased in all of its properties.

The most feasible method of liquidating the company's indebtedness and leaving something for its stockholders was to effect a sale. This was impracticable upon any kind of favorable basis without the acquisition of the English group of mines. This everybody knew. Steinfeld's letters to Zeckendorf teemed with it. As has been heretofore argued the greatest benefit that could be conferred upon the company was to procure the acquisition of the English group of mines by someone who would sell them as one group with the mines owned by the company, and this without respect to whether or not the company itself should acquire them.

It appears, therefore, that Steinfeld ordered the mine shut down without fraudulent intent or purpose, communicated to Zeckendorf all of his innermost thoughts and feelings on the subject; had no intent to damage the company, or knowledge or reason to know that the shut down would damage it, and that more than counterbalancing any such damage was the benefit derived by getting rid of the Nielsens, and having the English properties in the ownership of one who was willing to sell the same as one group with the Old Boot properties. It follows, as a matter of course, that no constructive trust can be predicated upon such act of Steinfeld.

C.

Steinfeld's expressions to Zeckendorf as to the desirability of purchasing the English group of mines, and his intentions in respect thereto, are not sufficient to constitute a constructive trust.

The allegation in the complaint, relating to this phase of the case is as follows:

"That said Steinfeld, at divers and different times during the year 1900 before purchasing said English group of mines, by letters to this plaintiff and to said J. N. Curtis, the president of said Silver Bell Copper Company, stated, in effect that he was going to purchase the same for the Nielsen Mining and Smelting Company, or the Silver Bell Copper Company, or for its use and benefit."

Upon this allegation the court found:

"Said Albert Steinfeld at all times had known, and said Zeckendorf had been told and informed by said Steinfeld that it was very desirable that said English group of mines, so-called, should be purchased, in order that all of the mines and mining claims surrounding said Mammoth mine should with it constitute one group, and in order that the whole thereof might be sold as one group and one property. * * *"

"That plaintiff knew nothing * * * of the facts concerning the purchase of said mines, properties or stock, and the prices paid therefor, or of the circumstances surrounding the same until long after May 20th, 1903, except that plaintiff knew that said Steinfeld had during the year 1890, and the early part of the year 1900, reported to plaintiff that the purchase of the same was desirable and should be accomplished, and that

Steinfeld intended for the company to acquire the same."

It is submitted as a matter of law, that neither the allegations of the complaint, nor the findings of the court are sufficient upon which to found a constructive trust.

It is also submitted that the evidence, to-wit, Steinfeld's various letters to Zeckendorf, is likewise insufficient, although as has been heretofore argued, it is insisted that such evidence cannot be reviewed on this appeal at the instance of the appellant for the reason that he failed to move for any additional finding based upon such evidence.

There is no allegation, finding or evidence to the effect that Steinfeld intended by these letters to mislead the plaintiff or the defendant corporation, and thus induce inaction on the part of the corporation, with respect to the purchase of said mines, while he secured them for himself. In other words, the essential element of fraud, either actual or constructive, is absent.

The language of the allegation that Steinfeld "stated in effect *that he was going to purchase* the same for the Nielsen Mining and Smelting Company," is nothing more than an expression of an intent and certainly does not rise to the dignity of a promise.

A wrong cannot be predicated upon the expression of an intent to do something which intent is not afterwards carried out.

Authorities on this point are collated in the 15th American and English Ency. of Law (2d Ed.), page 1193, and are conclusive.

“An expression by a guarantee before execution of the deed, of an intention not amounting to a promise, to hold for another, will not constitute him a trustee *ex maleficio*.”

Dilts v. Stewart, 43 Leg. Int. (Pa.) 205;
Stonehill v. Schwartz, 129 Ind. 310; 28 N.
E. 620.

“Even had he taken title under an express promise to hold it in trust for his wife—which the evidence shows he did not do—his denial of the trust would not be such fraud as to raise a constructive trust, unless it be shown that such promise was part of a scheme to get the title in himself to defraud his wife. (Cases cited.) We do not think that there was a constructive trust in the Kansas lands.”

Acker v. Priest, 61 N. W., p. 236, at p.
239; 92 Iowa, at p. 620.

“We understand the rule to be that casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust. 1 Perry, Trusts, Sec. 77. Our conclusion is that the bill, upon its face, does not show a case to justify the interposition of a court of chancery.”

Hamilton v. Downer, 38 N. E., p. 733, at
p. 735; 152 Ill. 651, at p. 656.

"It is equally well settled that a mere promise, unless the promisor has, at the time of making it, an intention not to perform, and by means of which the promisee is induced to part with property, will not constitute the promisor a trustee, *ex malificio* with respect to such property."

Piedmont L. & I. Co. v. Piedmont Foundry
& M. Co., 11 So., p. 332, at p. 334; 96
Alabama 389, at p. 395.

In passing from this subject we ask the indulgence of the court while we quote at length from a recent decision by our own Supreme Court, which we deem to be conclusive in favor our our contention.

"The appellee claims, however, that a constructive trust has been imposed; his contention being that where it appears that an agent employed by his principle to negotiate for the purchase of land purchases in his own name and with his own money; the transaction on account of the circumstances, will be held to be impressed with reasons of equity and justice with a constructive trust in favor of the principal.

"If we could ignore the fact that the pleadings raise no such issue and that upon the evidence the relation of Scribner was rather that of a bailee holding his funds subject to Meade's orders, than that of an agent to purchase or negotiate a purchase for Meade, we still do not think that a constructive trust could be held to be impressed. As said by Mr. Pomeroy, such trusts include all those instances where a trust is raised by the doctrines of equity for the purpose of

working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title and where there is no express implied written or verbal declaration of the trust. * * * They are often termed trusts *in invitum* and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly "constructive." *An exhaustive analysis would show, I think, that all instances of constructive trusts, properly so-called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source.* 2 Pomeroy's Eq. Juris., section 1044. One form of such constructive trust *ex maleficio* is where a person obtains the title to land by means of an intentional false verbal promise to convey to a third person, and having thus fraudulently obtained the property retains it. Equity regards such person as holding it charged with a constructive trust. The trust in such a case arises wholly from the fraud, and is in most jurisdictions expressly excluded from the operation of the statute of frauds. 2 Pomeroy's Eq. Juris., Sec. 1055.

"In all such cases, however, as pointed out, fraud actual or constructive must be found. Not only is the complaint here lacking in any allegation sufficient to cover such claim, but there is no finding of the trial court of actual fraud, or of such facts as would show constructive fraud, and the evidence does not support such claim."

Scribner v. Meade, 85 Pac., p. 477, at pp. 479-480.

I believe that we can best conclude this subject by the following quotation from the opinion of the Supreme Court of Arizona:

“The court found that Steinfeld, before purchasing the English group of mines, had at different times written Zeckendorf, his partner, that it was very desirable that the English group should be purchased so that it could be jointed with the Old Boot property and the whole sold as one group and one property, and that it was his intention to acquire the English group for this purpose. It must be remembered that the plaintiff, Zeckendorf, is here in the capacity of a stockholder of the Silver Bell Copper Company seeking relief on behalf of the company. We are, therefore, not concerned with the question whether Steinfeld, in purchasing the property for himself, has violated any duty he owed to Zeckendorf as a member of the firm of L. Zeckendorf & Company. Steinfeld’s expression of intention to Zeckendorf can have little bearing on the question under consideration, unless it should appear that his promise to purchase for the company was made or intended to be made to Zeckendorf as a stockholder of the company, and through him to affect in some way the subsequent conduct and relations of the corporation to the property, as by inducing the company to refrain from purchasing the property or from making any effort thereto; that it was so intended or did as a matter of fact have any such effect does not appear from anything in the record we have been able to discover. Certainly the findings do not so disclose. If Steinfeld had expressed an intention directly to the officers or directors of the Silver Bell Copper Com-

pany of purchasing for the benefit of the company, the English group, such an expressed intention would not have constituted Steinfeld a trustee *ex maleficio* unless his failure to carry into effect this intention had so changed the relations or situation of the corporation to its disadvantage with respect to the property as would amount to constructive fraud."

Scribner v. Meade, 85 Pac. 477.

Unless the corporation parted with something or lost or was deprived of something of value by virtue of such promise there was no fraud, and Steinfeld was in the relation of a mere volunteer, free to carry out his expressed intent or not as he might thereafter choose.

Piedmont L. & I. Co. v. Piedmont Foundry
& M. Co., 11 So. 332;

Pearson v. Pearson, 25 N. E. 342;

Stonehill v. Schwartz, 28 N. E. 620.

We find no ground for the application of the doctrine of equitable estoppel to this case. It is true that the Silver Bell Copper Company went into possession of the English group after its purchase by Steinfeld and was given by the latter the right of working the same and treating any ores that might be taken from the same in the company's smelter. It is likewise true that maps and reports were made showing the English group as a part of the Silver Bell Copper Company's property, and that these maps and reports were

made with the knowledge and acquiescence of Steinfeld for the purpose of effecting the sale of the entire property as a group. Under the settled rules governing the subject of equitable estoppel, before such estoppel could be predicated upon these circumstances it should appear that the corporation had been induced thereby to expend money on the property, which it otherwise would not have spent, or to incur some liability with respect thereto under the belief, entertained in good faith and occasioned by the conduct or statements of Steinfeld, that it was the equitable owner of the property. It does not appear that the Silver Bell Copper Company expended money on the English group of mines in excess of what it got out of the property under a belief that it was the equitable owner of the same, nor does it appear that it had borrowed money or increased its indebtedness or had become obligated to others in any way upon the credit of its beneficiary or equitable ownership of the English group. The assessment work upon the English group appears to have been done by the company under an agreement with Steinfeld, which was part consideration for his extension of the option of July 15th, 1901. Under no view of the facts and of the law are we able to arrive at any different conclusion as to the nature of the title held by Steinfeld to the English group of mines prior to May 20th, 1904, than that reached by the trial court.

III.

The proposition of July 15th, 1901, and the failure of the corporation to avail itself of it, concluded the corporation from contending that Steinfeld was a constructive trustee.

It is admitted that Curtis and Shelton knew of the proposition.

The court has found that Zeckendorf had no knowledge of it until long after May 1903. In September when the option expired, the stock belonged to and stood in the name of L. Zeckendorf & Co.

It is submitted as a matter of law that the knowledge of Steinfeld, the managing partner of such copartnership, was the knowledge of Zeckendorf, and that therefore, as a matter of fact, on the 15th of September, 1902, the corporation's equitable interest in the property, if any, terminated. It is not alleged that the proposition was withheld from Zeckendorf with fraudulent intent or at all. The troubles between Steinfeld and Zeckendorf did not arise until the fall of 1903. The corporation's rights terminated in September, 1902, and no subsequent events can reinvest the corporation with any equitable right which had ceased to exist.

IV.

Zeckendorf is estopped by his own personal laches from claiming a constructive trusteeship.

Zeckendorf's knowledge acquired by Steinfeld's communication to him, immediately upon his return from Europe [Finding XXVII, ~~p. 236, fol. 777~~] in connection with his letters to Steinfeld before and after the purchase, and his own testimony, are sufficient under the authorities cited, to bar him from claiming that Steinfeld held the same as constructive trustee.

On June 2, 1900, after Steinfeld had bought the Francis and Volkert titles and before he bought the Nielsen stock, Zeckendorf wrote him:

"Such investments to tie such large amount of money does not pay us, and I notice you keep us very short in money, while we ought to be flush. We have too much outstanding." [~~Abs. p. 716, fol. 211~~ *Folio 1176*]

It was natural, therefore, that Steinfeld should be loath shortly thereafter to expend or loan the firm's money in purchasing the Nielsen stock.

After Steinfeld told Zeckendorf upon his return from Europe in December, 1900, that he had purchased the English group of mines, Zeckendorf came to Tucson and visited the mines. It was a long and arduous trip by wagon, and as old a man as he would not have undertaken it except in pursuance of a determined purpose to

make a full personal investigation of the properties.

At that time substantially no development work had been done upon the English properties. Curtis testified:

"Nothing was done by me in the way of development before the 10th of June, 1901, that showed up those properties to any great extent. It was after July." [~~Abs. p. 368, fol. 1097~~] *Folio 368*]

"The smelter started I think it was in January, 1901. The smelter was running I know when Mr. Zeckendorf was there. That was in February, 1901." [~~Abs. p. 368, 369, fol. 1098~~] *Folio 368*]

When Zeckendorf saw them in January or February, 1901, they were in his opinion as he afterwards wrote Steinfeld respecting them, nothing but a lot of "prospect holes," or, as he testified, referring to his conversation with Curtis at the mine:

"When we talked about the Silver Bell I only thought of the Old Boot; the other mines I didn't think anything of. I looked upon them as mere prospects." [~~Abs. 231, fol. 694~~] *Folio 234*]

On the 19th of February, 1901, after his visit to the mines, he wrote to Steinfeld:

"I feel nervous about our numerous investments, and everything depends on the developments of the ore body." [~~Abs. 709, fol. 2120~~] *Folio 709*]

He remained silent and made no move either to reimburse Steinfeld or to assume Steinfeld's obligations.

On the 4th of November, 1901, Curtis wrote to Zeckendorf:

"We are now on the Imperial mine, (one of the Silver Bell purchase), which is proving to be very good; also a fine showing on the Southern Beauty (another of the Silver Bell purchase)." [~~Abs. 704, fol. 2105.~~ *Folio 704*]

It will also be remembered that it is the testimony that Zeckendorf insisted that Curtis should write to him full reports of the conditions at the mine; Curtis' letters were in pursuance of such instructions. The next week, and on the 10th of November, 1901, Curtis again writes to him in regard to the new find on the Imperial and Southern Beauty.

"The ore we have taken out is of good quality and the showing good and more extensive every day." [~~Abs. 704, fol. 2106.~~ *Folio 704*]

While these letters were encouraging, Zeckendorf still remained quiescent, and on the 14th of December, 1901, wrote to Curtis:

"We have to take into consideration the large amount of indebtedness due to our firm, which I desire to have reduced instead of increased." [~~Abs. 717, fol. 2144.~~ *Folio 717*]

This last letter was written immediately prior to his coming to Tucson in January, 1902.

Steinfeld swears that at that time he saw Zeckendorf reading the minute book of the Silver Bell Copper Company.

It is admitted that the minute book was in the safe of L. Zeckendorf & Co.

Zeckendorf admits that he examined the account of the Silver Bell Copper Company, as appearing upon the books of L. Zeckendorf & Co.

When his attention was called to items of such account tending to show the transactions involved in this litigation, he stubbornly persisted in swearing that those particular items escaped his attention, and that he never looked at the minute book. He just as stubbornly swore that Steinfeld never told him about having purchased the English group of mines, raising an issue of veracity which the court decided against him.

It will again be borne in mind that in January and February, 1902, when Zeckendorf was in Tucson, the price of copper had depreciated, and although the developments on the Silver Bell purchase looked good, in view of such depreciation, Zeckendorf was still cautious, and did nothing either on the one hand to obligate the company or the copartnership to reimburse Steinfeld, or on the other hand to expressly acknowledge Steinfeld's beneficial ownership in the mines. This under all the decisions cited, was laches.

On May 28, 1903, when Steinfeld wrote him that under his agreement with the company he had been paid \$18,117, Zeckendorf wrote:

"You surely cannot deal with yourself. You mean that these prospect holes are worth that

amount. On the same principle you could have taken any amount and credited the Silver Bell with anything you pleased." [~~Abs. 683, fol. 2043~~] *Folio 683*]

And again on the 18th of June, 1903, showing that while perhaps ignorant of the detail of the transactions, he was at all times cognizant of, and had his opinion upon the substance he wrote Steinfeld:

"You purchased these mines of Volkert and others for your interest and speculation with the expectation of developing another Old Boot, and as these expectations were not realized, the Silver Bell had to reimburse you." [~~Abs. 692, fol. 2070~~] *Folio 693*]

In view of this letter how can it possibly be held in Zeckendorf's behalf that Steinfeld was either an express or constructive trustee.

There can be no doubt but that on the 15th day of September, 1902, Steinfeld was the absolute owner for his own use and benefit of the English group of mines.

If on the 15th of July, 1901, when Steinfeld made his proposition, or on the 1st of October, 1901, when he offered to extend it, the defendant company had accepted the proposition and obligated itself to pay the money within a stipulated time, and to assume the indebtedness, and if then when the time for payment had arrived, it had been unable to meet the payment, the position assumed by the counsel for the plaintiff would be a

matter for argument, but no possible right can be initiated under an option given by Steinfeld to the Silver Bell Copper Company which the Silver Bell Copper Company would not agree to avail itself of.

The fact that the company deliberately would not agree to pay Steinfeld the money or to assume his indebtedness to Francis and Volkert is conclusive against any effort that may be asserted on behalf of the company to establish any interest whatever in the properties in question.

V.

**The Proposition of July 15th was not Extended
Beyond September 15th, 1902.**

The plaintiff therefore is foreclosed from asserting any rights whatever under Steinfeld's proposition of July 15, 1901, unless such rights be based upon an oral or written extension by Steinfeld of the time within which the company might avail itself of his option. It is readily understood that such an extension of time might be implied, *but there is no allegation in the complaint that the time was extended either expressly or by implication.*

On the contrary, it is alleged in the complaint that on May 20, 1903, Steinfeld RENEWED the proposition, thereby expressly precluding the plaintiff from assuming the position that such proposition by Steinfeld was still in force.

VI.

Curtis' reports showing English group of mines as property of the Silver Bell Company and development of said mines by the Silver Bell Company are of no effect to establish plaintiff's contention of trusteeship.

It appears by finding XIX [*Folio 1177* ~~page 236~~], that in the month of March, 1901, Steinfeld called upon Curtis for a report of the mines and mining property of the Silver Bell Copper Company, and that on the 24th of March, 1901, pursuant to said request Curtis delivered to Steinfeld a written report, describing the properties of the Silver Bell Copper Company, and included in said description the English group of mines, and that Steinfeld in March and April, 1901, circulated such report.

It will be remembered that Zeckendorf wrote out the certificate for 300 shares of stock in favor of Steinfeld as trustee, on the 19th of January, 1901, during Steinfeld's absence in San Francisco. That upon Steinfeld's return to Tucson, he saw the certificate, asked Curtis how he happened to sign it, was advised by Curtis that he had signed it at the request of Zeckendorf and believed that it was alright; and that thereupon Steinfeld claimed the stock and the English group of mines as his own, and sent Curtis to Franklin, with the result that Franklin advised him that he held such properties as trustee, and

that Steinfeld so believed until at least the 19th of May, 1901, when he wrote Curtis demanding interest upon the moneys which he had paid out.

After May 19, 1901, he again consulted Franklin, who gave him the advice, which resulted in the proposition of July 15, 1901. Therefore, in the months of March and April, 1901, Steinfeld by reason of his misunderstanding of the situation believed himself to be a trustee, which misunderstanding was corrected by Franklin in July, 1901. Hence such report made in March and April, 1901, can have no weight against Steinfeld as an admission.

The other reports mentioned in the same finding, and put in evidence, were made after the proposition of July 15, 1901, and while such proposition was effective. They mean nothing except that the corporation submitted to the public for sale these various properties upon which it had at the time an option from Steinfeld.

The court finds that after acquiring the Francis and Volkert titles, the English group of mines and the mines of the Silver Bell Copper Company were worked and operated by the Silver Bell Copper Company as one property [folio 1160] and that Steinfeld "as the same were acquired turned over same to the possession of" the company. [Folio 1163.]

As to the manner of such operation and possession Curtis' uncontradicted testimony is as follows:

“When Mr. Steinfeld returned from Europe, I first saw him after that in December, 1900. He told me that he had bought the English group of mines, and he wanted me to go out and take possession of these mines for him; and I then asked him if we could take any ore off these mines, and he said, ‘yes, all the ore you can find. * * * I don’t want to charge the company any royalty. I will give you all the ores you can get. * * * You are perfectly welcome to that ore, but I don’t want you to bring me any further in debt than I am at the present time.’” [Folio 288.]

VII.

Steinfeld not an Express Trustee.

It is alleged in the complaint that Steinfeld purchased the mines for the benefit of the Silver Bell Copper Company, which allegation is denied in the answer. The issue of fact thus raised is found by the court in favor of the defendants. [Finding XIII, fol. 1160; Finding XIX, fol. 1177-8.]

Under the rule these findings will not be disturbed by the court.

Moreover, the testimony is overwhelmingly in favor of the proposition that Steinfeld purchased these mines with the intention that they should be his own. The evidence adduced by the plaintiff consists entirely of alleged admissions of Steinfeld.

The chief admissions relied upon are the check which Curtis sent to Steinfeld for interest, in March, 1901, and of the entry in the books of the Silver Bell Copper Company that Steinfeld

held the mines as trustee and of the plaintiff's construction of the word "advances" in a letter which Steinfeld wrote to Zeckendorf after May 20th, 1903. The giving of the check and the entry in the books are sufficiently explained in the statement of facts. At the time Steinfeld received the interest check and directed the entry to be made in the books he believed himself, by virtue of Franklin's advice, to be a trustee, and was willing to be one.. When the company, through Franklin, refused to accept the purchase as made for its benefit, the checks were returned and the entry in the books remained subject to cancellation in the event that the company should not avail itself of Steinfeld's option.

Furthermore, no admissions can *create* a trust. No subsequent event other than a formal declaration of trust by Steinfeld for a consideration could create a trust.

"A trust must result, if at all, when the papers and the title pass. No agreement before or after the transfer, and no payment before or after, will raise a trust. It must be at the inception of the title."

Ducie v. Ford, 138 U. S. 587; 34 Lawyers' Edition, 1091.

"Resulting trusts grow out of accounts and do not arise from parol agreements, as if one purchase lands with his money and agree to give to another, no trust results."

Idem, note, page 1094.

“The trust must have arisen at the time the sale was made.”

Idem.

The entire transaction, and also the impelling testimony of the entries in Steinfeld's personal books, are set forth at some length in our statement of facts.

It is inconceivable that Steinfeld should have deliberately and fraudulently made these entries to subserve his own ulterior purposes. He made them at the time, years before, when there was no possibility of trouble or any idea that any of such entries could be material.

That this strong, accurate, uninterested and conclusive testimony should be outweighed by Steinfeld's use of the word “advances” in one of his letters to Zeckendorf after May 20, 1903, seems to us as it did to the court, preposterous.

VIII.

On May 20th, 1903, Steinfeld renewed the proposition of July 15th, but only with certain conditions and modifications, and the company in accepting such proposition accepted it with such modifications and conditions, and they were an essential part of such contract.

As appeared by the statement of facts, the transactions of May 20th, 1903, and subsequent thereto, were the subject matter of the first appeal to the Supreme Court of Arizona. Upon that appeal

the court determined that the plaintiff was not entitled to recover unless he could establish that Steinfeld held the properties as trustee for the company. It is believed that such decision of the Supreme Court became thenceforth the established law of this case.

Gila Valley Railroad Co. v. Lyons, 9 Arizona 218, and cases cited.

Failure of counsel in appellant's assignment of errors even by implication to refer to such transactions would indicate that they had accepted the view of the Arizona Supreme Court, and would make no contention here adverse to the holding of the lower courts on the question of the validity or effect of the annulling or rescission of the contract of May 20, 1903. As heretofore suggested, however, for precaution's sake, we deem it our duty to give the matter the same consideration as if it were subject to review and had been properly assigned.

If it be conceded that Steinfeld was the beneficial owner of the English group of mines, and that the right of the Silver Bell Copper Company to the entire purchase price became established by the written agreement of May 20, 1903, then the annulling or rescission of such agreement would necessarily reinvest in Steinfeld his proportion of the purchase price. That such agreement was effectively annulled by the unanimous passage of

the resolution offered by Zeckendorf at the stockholders' meeting must be conceded. Counsel for plaintiff, therefore, on the first appeal undertook to establish that Steinfeld parted with his interest in the purchase price by some agreement other than the written agreement of May 20, 1903.

This theory was suggested in the dissenting opinion of Mr. Justice Nave on the first appeal. Upon a re-hearing which was granted by the Supreme Court, Judge Nave retreated from the position which he had assumed in such dissenting opinion, and concurred with the other judges of the court in the judgment of reversal. [11 Ariz. 192; 89 Pac. 496.]

Counsel contend that a contract, separate and distinct from the written agreement of May 20th was entered into between Steinfeld and the company, such contract consisting of the offer of Steinfeld to transfer his interest to the company and the acceptance of such offer by resolution of the board of directors.

In setting forth such contention plaintiff alleges in the amended complaint as follows:

"That on said 20th day of May, 1903, and prior to the making of the sale hereinafter set out and alleged, said Albert Steinfeld, being the owner of all of the stock of the said Mammoth Copper Company, presented to the said defendant, the Silver Bell Copper Company, *the renewal* of said offer (the proposition of July 15th, 1901), to transfer said properties * * * upon his being paid the said sum of \$18,117, which said offer on the

part of said Steinfeld by resolution of the board of directors of said Silver Bell Copper Company entered in the minutes of said corporation was then and there accepted by the Silver Bell Copper Company [folios 779-780] * * * it being then and there agreed, however, * * * that the said \$515,000 purchase price of said properties *was the property* of the Silver Bell Copper Company, and that all cash and notes representing said purchase price or installments thereof, as hereafter stated, *were the property* of said Silver Bell Copper Company [folio 781] * * * which last mentioned sum the said Albert Steinfeld * * * received * * * as a full payment of all sums whatsoever that might be due or owing from the said Silver Bell Copper Company for or on account of any or all interests that the said Steinfeld and the said Mammoth Copper Company, or both, had or might have in or to any of the said properties * * * and in accepting said sum of \$18,117 as aforesaid, said Steinfeld for himself and for said Mammoth Copper Company thereby released and relinquished to the said Silver Bell Copper Company any and all interest either or both might have or did have in or to any of said properties." [Folio 784.]

"That after the completion of the sale aforesaid * * * the said Albert Steinfeld, Mammoth Copper Company and Silver Bell Copper Company on or before the 26th day of May, 1903, and not earlier than May 25th, 1903, executed a memorandum in writing dated May 20th, 1903, *denominated an agreement*, in and by which the said parties recited over their own signatures that all of the proceeds of said sale, including the said notes and the said cash were the property of the said Silver Bell Copper Company * * * That a copy of said memorandum so signed by the said parties was spread upon the minutes of a meeting

of the said board of directors of said defendant corporation, the Silver Bell Copper Company, held after the 24th day of May, 1903, and on or about the 26th day of May, 1903, the minutes of said meeting, however, being incorrectly dated the 20th day of May, 1903." [Folio 785-786.]

The vital and essential allegation of the complaint, in our opinion, consists of that portion of the first of the above quoted paragraphs, in which it is alleged that on the 20th day of May, 1903, Steinfeld "being the owner of all the stock of the said Mammoth Copper Company, presented to the defendant the renewal" of the proposition of July 15th.

The plaintiff squarely stands upon the ground that on the 20th day of May, 1903, Steinfeld through his ownership of such stock of the Mammoth Copper Company, was the owner of the English group of mines, and he bases his rights in this suit upon the ground that on said date Steinfeld being such owner, *renewed a proposition to sell*, which had been previously made, and which had been determined by limitation; that such renewal was accepted, and the rights of the defendant corporation are thus founded upon said alleged proposition and acceptance by Steinfeld on said 20th day of May, 1903, and upon nothing else.

There is no escape, it seems to us, from this position. The plaintiff must stand upon his complaint.

If the plaintiff had alleged that Steinfeld renewed his proposition with certain conditions, the allegation would not have been denied. Steinfeld, being the owner, did make a proposition to sell these properties for \$18,117, but with certain modifications and conditions which had not been imposed by him at the time he made the proposition of July 15, 1901.

These modifications and conditions were clearly within the right of Steinfeld to make, and he imposed them. The essential condition was that there should be no distribution or dividends and he should have the custody and control of the purchase price until he should be discharged from his responsibility as guarantor of the titles to the mines.

In their answer the defendants denied that the proposition of July 15th, 1901, was renewed or accepted. [Folio 863.] And allege that such proposition was renewed with certain modifications and conditions and that the offer with such modifications and conditions was accepted by the company acting by resolution of its board of directors and that an agreement was executed which is the agreement mentioned and described in the foregoing quoted paragraph of the complaint and called therein "a memorandum in writing denominated an agreement." [Folio 864.]

The court makes no finding as to what transpired at the directors' meeting, but simply sets

forth the minutes of such directors' meeting without finding whether such minutes did or did not faithfully represent the proceedings of the meeting [Finding XXVII, pp. 404-406].

It does find that the agreement which was executed bearing date the 20th of May, 1903, was, as a matter of fact, executed on that very day, although after the sale to the Imperial Copper Company was completed [Finding XXV, fol. 1182.], and "that the terms of this agreement and that it should be executed were, however, all orally agreed upon before the said sale was completed or such money was paid." [Folio 1185.]

It is further found [folio 1186] that the directors' meeting purporting to have been held on the 20th of May, 1903, was actually held on that day.

It is obvious from the minutes of such meeting that the agreement of May 20, 1903, was executed prior to the directors' meeting.

It appears from the minutes that at such meeting the president reported the facts constituting the sale of the preproperties to the Imperial Copper Company; that he then further reported that Steinfeld "had again submitted for acceptance the proposition which he had heretofore submitted in writing on July 15, 1901, with the modifications, however * * *" [Folio 1187.]; and then follows a full statement of the terms and conditions which accompanied the renewal of the proposition.

The report of the president to the meeting immediately after the setting forth of the conditions imposed by Steinfeld, concludes as follows:

"The president also stated that it was necessary to adjust with the Mammoth Copper Company the disposition that was to be made of the purchase price upon the sale. He then submitted the agreement between this company, the said Mammoth Copper Company and Albert Steinfeld on this point, and also covering the matter of guaranty." [Folio 1189.]

Then follow the resolutions which conclude as follows:

"Resolved that the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company and indemnifying the said Steinfeld, be, and the same hereby is, ratified, approved and confirmed." [Folio 1190.]

It is manifest that this agreement so submitted and so ratified and approved, was the written agreement set forth in full in Finding XXV, and that, therefore, the execution of this agreement preceded the directors' meeting.

It follows, therefore, inevitably, that prior to the meeting of the board of directors, the purchase price had by virtue of such written agreement been established in the Silver Bell Copper Company.

The ratification of such written agreement by

the directors made it effective as from the time of its execution, and it cannot be contended that the title to the purchase price passed by another or different contract consisting of the acceptance of a proposition after such title had already passed by virtue of such written agreement.

A proposition to a corporation and its acceptance by a board of directors is nothing more nor less than a contract made by correspondence where one party makes a proposition in writing and the other party accepts it.

It is unquestionably the law that a contract of this character, as well as an oral contract when followed by a formal agreement is merged in the formally written contract.

Keystone Surgical v. Bate, 46 Atl. Rep.
887; 196 Pa. St. 566.

The minutes of a directors' meeting of a corporation are only evidence of what occurred at the meeting.

Handley v. Stutz, 139 U. S. 417;
Gilson Quartz Mining Co. v. Gilson, 51
Cal. 341.

The actual proceedings of a board consist of the things which are actually done by the members of the board at the time of the holding of the meeting. The minutes may be written up by the secretary at any convenient time after the holding of the meeting, and the statements in the minutes

of what occurred are not conclusive, and may be rebutted by the testimony of those who were present at the meeting. As a matter of fact it seems clear to us, just as found by the district court that the terms of the agreement were orally arrived at between Curtis and Franklin representing the company and Steinfeld representing himself and the Mammoth Copper Company prior to May 20th. The real and only meetings of the directors were the informal, but controlling conferences and conversations held between these parties prior to May 20th. These were merged and embodied in the written agreement of May 20th. The sale was completed, the money was obtained and the deeds delivered. The minute book was then passed over to the attorney (as is the almost invariable custom) in order that the transaction might be legally recorded therein, and the minutes having been prepared by him the directors signed them as a matter of course. The minutes were doubtless prepared by Franklin to conform to what had actually been done; to be a correct record of corporate acts, and they embodied as near as Franklin could embody in them, what he believed had been done by the respective parties. It is not conceivable under the evidence that Steinfeld at any time appeared before the board of directors and made to the board any formal proposition which the board then and there considered and accepted. There is certainly no evidence to sustain

such a finding. *The minutes themselves do not say that Steinfeld appeared and made a proposition. It is stated that the president reported that Steinfeld had made the proposition, and it is submitted that this is no evidence that as a matter of fact Steinfeld did make such a proposition.*

As stated by Judge Nave, in his opinion upon the re-hearing:

“One sentence in that agreement is as follows: ‘In consideration of the premises, and of the sum of one dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale shall belong to and be the property of the said Silver Bell Copper Company.’ I am now of the opinion, contrary to that which I entertained at the former hearing, that this agreement was the formal expression of that portion of the contract created by Steinfeld’s offer and its acceptance, which pertained to the conveyance of the mining claims or the proceeds of the sale thereof; that it was in fact the instrument of conveyance. In this view, the rescission of that agreement operated to restore the status of the parties with respect to the ownership of the mining claims, and of the purchase price of the mining claims, to that existing prior to the execution of the rescinded agreement.”

It will be noted that there is no suggestion in the minutes of the meeting that the \$18,117 was repaid or refunded to Steinfeld. The condition which Steinfeld imposed was that the company “shall pay to him forthwith in cash” the \$18,117,

and that the company "shall also assume and pay all obligations" which Steinfeld had incurred, and "keep him free and harmless from any and all expenses and loss which may arise to him by reason of any claim or asserted claim of any person whatsoever, for or on account of, or arising out of or connected with the present sale and negotiation or any past negotiations or transactions in regard to said mining claims or any of them." [Folio 1188]

It was resolved that Steinfeld "be forthwith" paid the \$18,117, and that he retain sufficient moneys to pay Francis and Volkert and the Nielsens. There was no suggestion that this money should be paid to Steinfeld as money due by the company to Steinfeld. It was paid to him by reason of the acceptance of his proposition, renewed on that day and accepted on that day; and in consideration for his transferring to the company the entire purchase price of the mines.

The agreement provides, not that all the purchase price "*was*" the property of the company, as alleged in the complaint but that the purchase price "*shall* belong to and be the property of the Silver Bell Copper Company."

There is no gain-saying the effect of the word, "shall." It imports the direct opposite of what the plaintiff alleges in his complaint. It means that the purchase price did not theretofore belong to the company; but that for a valuable consider-

ation, it thereupon became the property of the company.

The agreement further provided that the entire purchase price should be held by Steinfeld as security "against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company or any other person whatsoever." [Folio 1184.]

This language embraced Steinfeld's liabilities to Murphy, to Burnett, to Nielsen, to Francis and Volkert, and to the Imperial Copper Company. For the first time now did the company become responsible for the \$12,500 due to Francis and Volkert, and for the \$10,000 due to the Nielsens.

Chronologically, the company had now become the owner of the purchase price, and the letters which Steinfeld wrote subsequent to the 20th of May, 1903, in which he acknowledged the purchase price to be the property of the company, have no force as admissions against him in this suit. By virtue of this agreement the Silver Bell Copper Company between the 20th day of May, 1903, and the 26th of December, 1903, when the agreement was annulled, did have the legal title to the entire purchase price subject only to Steinfeld's right to hold the same temporarily as security.

IX.

These modifications and conditions having proved unacceptable to Zeckendorf, and he deeming said contract to be for Steinfeld's interest, and it being conceded that Steinfeld as director voted for the execution of such contract with himself and Zeckendorf having brought suit as such stockholder in behalf of the corporation, alleging that such contract was fraudulent, and asking to have it annulled, it was proper for the directors to annul and rescind the same.

The contract of May 20 was unquestionably voidable. There were only three directors. Steinfeld was one, and Shelton, one of the others, was under his dominion. It was a contract with Steinfeld himself.

By the terms of the contract, Steinfeld gave the company whatever interest he had in the English group of mines and the 300 shares of stock and nothing else. Zeckendorf believed and still believes that Steinfeld gave up nothing by executing the contract; for it was his contention in his letters at that time as it is in this litigation, that Steinfeld had no beneficial interest in either the stock or the English group of mines. If he was either an express or a constructive trustee (and both are alleged) he was entitled only to the reimbursement of the moneys which he had actually paid, with interest at the legal rate, which was six per cent. He was not entitled to the thousands

of dollars which he had expended upon his son and himself during their trip to Europe, nor to interest at the rate of one per cent per month. Assuming that Steinfeld was the beneficial owner of the English group of mines, their value was problematical. Zeckendorf believed them to be nothing but "holes in the ground." He believed that they having proved to be valueless, Steinfeld was endeavoring to saddle them upon the company. Therefore, there was grave doubt whether Steinfeld had given up anything of considerable value if, indeed, he had given up anything at all, by the execution of the agreement.

The company, on the other hand, by such agreement, was giving to Steinfeld \$18,117, was, moreover, delivering to him the custody of all of the purchase price for perhaps an indefinite period of time, and was assuming various and serious liabilities.

During the period between May 20 and December 26, 1903, these liabilities were indefinite and unascertained. They are not as yet definite. Since this action was commenced, Mary Nielsen has brought an action against Steinfeld for \$150,000.

Under the agreement of May 20, the Silver Bell Copper Company would be obligated to indemnify Steinfeld against any judgment which might be rendered in such action.

In fine, the contract of May 20 was one which Zeckendorf could have readily procured to be avoided by instituting a suit in behalf of the corporation for that purpose.

Zeckendorf had undoubtedly taken legal advice in the premises. The words in his letter, "you cannot deal with yourself," smack of the law, and showed that he was advised of the voidability of Steinfeld's transactions with the company. He came to Tucson and demanded a dividend and resisted Steinfeld's claim to the custody of the money and notes; he was violent and abusive; he instructed the Bank of California to withhold the money and notes from Steinfeld.

It is true that up to this time he had not seen the minute book, but in San Francisco, before the institution of the stockholders' suit, Steinfeld gave him the minute book, and Zeckendorf, and Lilienthal, his attorney, had it in their possession for several days.

He brought suit, alleging that Steinfeld based his claim to the money and notes upon the alleged resolutions "which pretended resolutions purported to authorize the execution of some agreement or agreements between said Silver Bell Copper Company and said Steinfeld. That said pretended resolutions do not set forth the terms of said agreements and neither the said agreements nor the substance thereof is set out in the minutes of said board as follows:

“Resolved, that the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be, and the same is hereby ratified, approved and confirmed,”

and except that there appears in said minutes the following resolution:

“Resolved that the president and secretary of this company be, and they are hereby authorized empowered and directed, in such manner and form as they deem necessary or proper, to indemnify said Albert Steinfeld against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the property so sold or agreed to be sold to the said Imperial Copper Company, and that he and they hereby are authorized, empowered and directed to do or cause to be done all things, and to execute all papers, documents, which they deem necessary in the premises.” [Folio 607-8.]

He further alleged that the resolutions were void “in that Steinfeld joined in the vote therefor, and that the other two directors are in the employ of Steinfeld and wholly under his control” * * * and in that they were pretended to be adopted at the instigation of said Steinfeld, and as a part of a scheme on his part to defraud said company and its shareholders.” [Folio 606.]

He prayed that Steinfeld be required to set forth the nature of his claim to the moneys and notes, “and the terms of the agreement refer-

red to in said resolutions," and "that said resolutions and the agreements therein referred to, be declared null and void." [Folio 612.]

He thus demanded that the agreement and the resolutions ratifying, approving and confirming it be declared null and void.

While he had not seen the agreement, which he thus wanted annulled, he knew from the minutes its principal subject matter. He had read in the minute book, "The president also stated that it was necessary to *adjust* with the Mammoth Copper Company the disposition that was to be made of the purchase upon the sale; he then submitted the agreement between this company, the said Mammoth Copper Company and said Steinfeld *upon this point*, and also covering the matter of guarantee."

Steinfeld's proposition was expressly referred to in the minutes of the meetings of May 20th and October 1st, 1901. [Finding XVII, folio 1174.]

It appears by the minutes of the latter meeting that Steinfeld at such time stated that in consideration of the company performing and paying for the assessment work upon all of the mining claims mentioned and described in his proposition, he would extend it. It was thus known to Zeckendorf, and to his counsel, that Steinfeld claimed the ownership of certain mines which he was offering to sell to the company, and that such

mines were the subject matter of this very agreement which he was seeking to annul.

What then was the status upon the filing of this suit?

In the first place, there was no defense to it. Steinfeld *had voted* for the resolution and the agreement authorized by such resolution *was* a contract made with Steinfeld himself.

Zeckendorf was claiming that such contract was for the benefit of Steinfeld. Steinfeld and the directors at all times maintained that the contract was not for the benefit of Steinfeld. For the reasons, however, which have been set forth in this point, it was not at such time manifest, nor could it be made manifest, whether such agreement of May 20, was for the interest of Steinfeld or of the corporation.

Zeckendorf had asserted that the \$18,117 was an excessive valuation for the English group of mines, and in this action he swore that the "Resolutions were adopted at the instigation of Steinfeld as a part of a scheme to defraud the company and its shareholders."

What, then, was the duty of Steinfeld and the directors? Clearly it was Steinfeld's duty to acquiesce, and clearly no conceivable impropriety can be alleged of the acquiescence of Curtis and Shelton. If there had been no stockholders' meeting, and if Zeckendorf had not voted to annul and rescind the agreement of May 20, 1903, this

complaint of itself would have fully authorized the directors to annul it, and Zeckendorf's verification of it and filing it would estop him from questioning their action.

Steinfeld, however, noted in particular, the following allegation in said complaint: "That said pretended resolutions do not set forth the terms of said agreement, and neither the said agreements nor the substance thereof is set out in the minutes of said board * * * " which allegation was followed by the prayer "that Steinfeld be required to set forth the nature of his claim to said money and said notes and the terms of the agreements referred to in said resolutions."

He thereupon returned to Tucson, and on the 19th of December delivered to Zeckendorf a copy of the agreement of May 20, 1903. [Folio 255.]

On the following day he served upon Zeckendorf a notice, as follows:

"I hereby demand the immediate dismissal of the injunction suit instituted by you in the Superior Court in San Francisco * * * and I will comply fully and forthwith with the terms of the contract existing between me and the Silver Bell Copper Company, copy of which was given you on Saturday, December 19, 1903, and bearing date of the 20th day of May, 1903." [Fol. 254.]

This notice Zeckendorf ignored. His suit in San Francisco had been brought; his prayer that Steinfeld set forth the nature of his claim to the

moneys and the terms of the agreement had now been complied with. The complaint, however, still alleged that the agreement of whose contents he was now fully apprised, was fraudulent and still demanded that the resolutions and the agreement be declared null and void.

Steinfeld and the directors had now no escape from the situation other than to fight the San Francisco suit or assent to the annulling of the agreement.

Steinfeld determined, however, not to rely upon this implied insistence by Zeckendorf upon his demand that the resolutions and agreements be declared null and void.

He testified [folio 433]:

"It was my intention that if Zeckendorf failed to comply with my demand and dismiss those suits (referring to demand served on December 20) to call a stockholders' meeting, and take such action as was necessary to annul and rescind that contract *just as prayed for in the complaint.*"

In pursuance of such intent notice of a stockholders' meeting was given. Zeckendorf attended it in person and by his attorney.

What he Wanted was a Dividend.

Steinfeld testifies [folio 421-2] that in November, 1903, Zeckendorf took him in his private office and closed the door and

"He made a demand on me in writing that I should immediately give him a check on the Bank

of California for \$50,000 and an order on the Bank of California for \$25,000 to be paid out of the next note, and another one for \$25,000 to be paid out of the last note, making altogether \$100,000, and he made this demand in a very threatening and abusive manner so much so that I thought he was out of his mind. He was in such a rage and so I asked him to come into the general office, and I told him then that I refused to comply with the demand * * * and he said *if you don't give me that money I will bring some legal proceedings and I will compel you to do so.* * * * *He said he would wait for the minute book."*

This evidence Zeckendorf does not deny.

It therefore appears that *Zeckendorf threatened to bring legal proceedings to compel a dividend.* The agreement of May 20, 1903, barred dividends. That agreement he wanted done away with. The legal proceedings which he had threatened, he proceeded immediately to institute. He said that he would wait until he saw the minute book; as soon as he saw the minute book in San Francisco and appreciated that the resolutions and agreement provided that dividends should be withheld, he filed this suit to set aside and declare null and void such resolutions and agreement.

The announcement by Steinfeld that he had turned over the funds to the treasurer of the company before *the stockholders' meeting had been regularly organized did not satisfy Zeckendorf.*

The stockholders met. The complaint was read. Zeckendorf was notified that the prayer

of his complaint in some respects had been complied with and he was asked to dismiss it. Steinfeld's attorney specifically stated that Steinfeld had complied with the prayer of the complaint demanding that he set forth the nature of his claim to the money and notes. Zeckendorf made no demand for the proposition of July 15th, although through the minute book and Steinfeld's letter of June, 1903, he knew of its existence.

The resolution of rescission was offered. His own attorney asked that the agreement of May 20 be attached to it.

It is manifest from the complaint that Zeckendorf's legal advisers did not consider the contract of May 20, 1903, as establishing the ownership of the purchase price in the Silver Bell Copper Company, *or else as being of any value*. It is alleged in the complaint that the Silver Bell Copper Company at all times owned these properties and this stock, and without any agreement, owned the entire purchase price.

It is alleged with respect to the agreement of May 20, 1903, that Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company "executed a memorandum in writing *dated May 20, 1903, denominated an agreement, in and by which the said parties recited over their own signatures that all of the proceeds of said sale were the property of the said Silver Bell Copper Company.* [Folio 785.]

Ives testifies that during the negotiations in San Francisco, he told Lilienthal, he thinks in the presence of Zeckendorf, that

"Mr. Steinfeld told him (Ives) that the Silver Bell group of mines which he had purchased and paid his own money for, *were worth more than the original properties of the Nielsen Mining and Smelting Company, and that if he brought an injunction suit as a stockholder he would in order to withhold from us the custody of those notes, he would have to ask that this agreement giving us the custody be rescinded and that if he did, the proposition of July 15, 1901, having lapsed, Mr. Steinfeld would get back and be entitled to his proportionate share of those proceeds, and that Mr. Zeckendorf might suffer a considerable loss and Mr. Lilienthal laughed at me at my view of the legal status.*" [Folio 267]

This evidence is not denied.

Appellant has had a full year since the cause was remanded for a new trial to take Lilienthal's deposition if Ives' testimony was susceptible of denial.

It is therefore obvious that not only the counsel for the plaintiff in the present suit, but his counsel at that time, Mr. Lilienthal, and his counsel at the stockholders' meeting, Judge Barnes, were all of the same opinion, to wit, that the Silver Bell Copper Company owned these mines and this purchase price and the 300 shares of stock, regardless of the agreement of May 20, 1903, or else that such mines "were mere holes in the ground."

They did not deem the rescission of that agreement as dangerous, and with full knowledge of the facts and of the contention of Steinfeld as to what the effect of such rescission would be, the suit was brought in San Francisco, and the resolution was passed at the stockholders' meeting.

Several times during that meeting Steinfeld reiterated his demand that the injunction suit at San Francisco be dismissed, and Zeckendorf and his attorney repeatedly refused to dismiss it. Even after the resolution of rescission had passed, Steinfeld asked and Zeckendorf refused to dismiss the San Francisco suit.

Mr. Ives representing Steinfeld and Judge Barnes representing Zeckendorf, made the following statements:

In response to Judge Barnes' request at the stockholders' meeting for a dividend, Ives representing Steinfeld, said:

"I won't say there won't be any distribution but I think these suits should be dismissed without any conditions whatever. We have complied with the prayer of your complaint.

"Mr. Barnes: I won't say whether they will be or not * * *. These things will have to be done somewhat simultaneously. You cannot expect those things to be done as concurrent acts." [Fol. 206.]

"Mr. Ives: This is practically a demand by Zeckendorf who chances to be plaintiff in a suit which appears to me to be totally without merit.

"Mr. Barnes: I have not said that. I said we would consider this matter. I have not said what we would do.

"Mr. Ives: We feel that we should be met now and the injunction suit dismissed and the attachment suit.

"Mr. Barnes: We will consider that." [Fol. 1206.]

When, therefore, the directors met after the stockholders' meeting had adjourned, with knowledge that the custody of the notes had been restored to the company, that a resolution had been passed by the stockholders annulling and rescinding the agreement of May 20 and that Zeckendorf still persisted in his suit, alleging that the resolutions and agreement were fraudulent and demanding that they be declared null and void, it was their plain duty as trustees for the stockholders who had unanimously expressed their will, to pass the resolution of rescission, and they did so.

Steinfeld's intent is certainly plain. It was in his mind in San Francisco when he told Ives and Ives told Lilienthal that if the rescission suit were brought, Steinfeld would be reinvested with his proportionate share of the proceeds. His action in giving Zeckendorf a copy of the agreement and in serving upon him the demand to dismiss his suit, bespeaks the same intent.

The contract was an entirety. The Silver Bell Copper Company was not entitled without the consent of Steinfeld, to rescind it in part. There is nothing to indicate that Zeckendorf demanded a rescission of any part of the contract. He could not have demanded a rescission of part of it. He

only could have asked Steinfeld to assent to a rescission of part of it. A demand and a suit brought mean the insistence upon a legal right. The fact that he brought suit shows conclusively that his purpose and intent were to get that to which he was legally entitled. At no time did he *request* a dividend in November, 1903; he *demand*ed it and threatened to enforce his demand for his legal right by legal proceedings. We therefore cannot escape the conclusion that Zeckendorf's intention was to enforce that to which he was legally entitled. It is axiomatic that one party to a contract cannot declare a part of the contract null and void. He must either abide by the contract, even though it be tainted by fraud or annul it *in toto*.. He cannot elect to enjoy the benefits of a portion of it and repudiate the obligations of another portion.

"There is no principle of equity which would allow this plaintiff to attack that transaction. He does not propose to do the fair thing. He asks the court directly by the prayer of his bill to give him all the benefits which his corporation secured by the trade, and to relieve him from every burden assumed. He wants to retain all the property received from the other two corporations, and at the same time have the defendant corporation's issue of stock and its assumption of the bonded indebtedness both declared void. If the corporation was here as plaintiff asking such relief, it would present a spectacle not pleasant to the eyes of a court of equity: and yet a corporation has no heart

and no soul, and therefore may not always appreciate what is exact justice between man and man. It surely follows that this sight is no more pleasant for equity to behold when presented by a living, breathing plaintiff. At this point another reason at once presents itself why the issue of stock by the defendant corporation should not be declared void and fictitious. It was issued in pursuance of a contract, as part of an immense business transaction as part of the consideration for the transfer of vast property interests. That *transaction is one and inseparable. It must stand or fall together. And that issue of stock cannot be set aside and canceled unless the whole transaction is set aside and canceled.* The burdens and benefits are inseparably connected. To hold otherwise would sanction injustice and dishonesty, and no court will be found to so declare. * * *

Smith v. Ferries & C. H. Co., 51 Pac. p. 716.

This case is precisely in point. *Zeckendorf was at all times acting under the advice of eminent counsel.* The San Francisco suit is still pending. It is the inevitable inference from his threats in November, and his execution of those threats thereafter, and from all of his actions up to and including his vote at the stockholders' meeting that he intended at all hazards and at any cost that the agreement of May 20, 1903, should be rescinded and held null and void.

The foregoing considerations are not affected by the thirty-second finding, which is in effect,

that Zeckendorf in voting to rescind the agreement of May 20th, did not understand or know, or believe that the effect of such action would operate to give Steinfeld a right or claim to any of the proceeds of the sale, and that the directors "did not in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement."

This finding is the conclusion of the court from the proceedings at the stockholders' meeting. Zeckendorf was put upon the witness stand, but was not interrogated as to what he did understand or believe or intend at the time he voted for the resolution. The court does not make any finding as to what was Zeckendorf's intent. It finds negatively that he did not know that the effect of the rescission would be as claimed by Steinfeld. Nor has the court found affirmatively what the directors did believe they were instructed to do by the stockholders' resolution. They were certainly instructed to rescind something. The agreement was an entire one. The finding is that they did not believe that Zeckendorf wanted all of the agreement rescinded. Being powerless to rescind only a portion of it, what then was their duty? They must perforce do nothing, or rescind the agreement in its entirety.

Assuming that Zeckendorf would have prefer-

red to rescind a portion of the agreement and to let a portion of it stand. That left the directors still in the dark as to what would have been his preference if compelled to elect between rescinding the agreement or letting it stand *in toto*.

It was neither the duty nor the right of the directors to assume in the face of the unambiguous instruction of the stockholders that such instruction would have been withheld if they had been more fully advised as to its legal effect. The contract was as a matter of fact voidable and constructively fraudulent. They had no choice. Zeckendorf had the right and had manifested a determined intent to annul it.

Zeckendorf with a full disclosure of the facts, and acting under legal advice wanted the agreement rescinded. It was not for the directors to determine whether he was acting wisely or unwisely. Franklin and Lilienthal and Zeckendorf's present counsel all believe that Steinfeld was a constructive trustee, and if this court should so hold, then the rescission of the agreement was undoubtedly for the benefit of the court.

It was not the duty of the directors to pass upon the legal question as to whether or not Steinfeld was a constructive trustee. They owed Zeckendorf no such duty. They did precisely what he voted that he wanted them to do.

The rescission was at most voidable. The complaint and the evidence show that the plain-

tiff has never sought to avoid it and does not even now seek to avoid it; that he has always believed and still believes that the written agreement of May 20th was to the disadvantage of the corporation and that the rescission of it was for its benefit.

Grant that the plaintiff would never have favored a rescission of the contract if he had believed that the effect of such rescission would be to donate to, or re-establish in Steinfeld a right to one-half or to any portion of the purchase price of the mines. Nevertheless it appears that the plaintiff did not at the time he sought the rescission, and does not now believe that the effect of the rescission would be or was to entitle Steinfeld to any part of the purchase price. Acting with full knowledge of the facts, he took his chances as to what the result might be, and, therefore, under the authorities, he is forever estopped from questioning the validity of the rescission, even if he was mistaken as to the legal effect of his action.

Kelley v. Newburyport R. R. Co., 6 N. E.
745, at p. 748, 141 Mass. 496.

Let us assume for purposes of illustration, that the District Court had adjudged in Zeckendorf's favor that the Silver Bell Copper Company was at all times the beneficial owner of the English group of mines, and that the defendants had ap-

pealed to this court, the pleadings and evidence being the same as in this record.

It cannot be seriously argued that this court, under such circumstances, could, without Zeckendorf's demand and prayer, and against his wishes, declare the rescission void. Zeckendorf does not now demand that the rescission be avoided.

It is therefore respectfully submitted that under every aspect of the case, the rescission must, upon this appeal, stand effective and unimpeached.

The only allegation of the complaint referring to Zeckendorf's state of mind and understanding at the time he voted for the resolution is the following:

"And that at said stockholders' meeting it was voted to rescind said resolutions above set out and said contract of May 20th, 1903, and no other or different contract or resolutions, and if the action taken at said stockholders' meeting had the effect, on its face, of rescinding any other resolutions or any other contract adopted on said 20th day of May, 1903, or under date thereof, particularly the contract entered into by the acceptance of said offer of Albert Steinfeld as to the payment to him of said sum of \$18,117.00 and the payment thereof, such action was a mistake on the part of this plaintiff and was not intended as such, and was a mistake on the part of the other stockholders of said company present at said meeting, and was not intended as such. * * *" [Trans. p. 334, folio 791.]

There is no prayer that the rescission be set aside.

It is submitted that this allegation is not sufficient to support a judgment setting aside the rescission on the ground of mistake. It will furthermore be noted that there is no allegation of mistake. The allegation is conditional. It says that *if* the action taken at the meeting "had the effect on its face of rescinding any other resolutions or any other contract adopted on the 20th of May, 1903, than the written agreement of 1903 the action was a mistake. We do not claim that the action rescinded anything more than the written agreement of May 20th, 1903, and, therefore, there is no allegation of mistake.

As has been already argued, the whole theory of his contention is that the title to the purchase price passed by some contract other than the one which was rescinded, and he says that if the rescission rescinded in addition to such written agreement this other contract which he is endeavoring to establish, he made a mistake in voting for it, the mistake consisting not in the rescinding of the written agreement of May 20th, but in that he did not intend to rescind this other contract. If, as we contend, there was no other contract, then there was no mistake.

Even if the complaint be considered to allege properly such a mistake as may be the foundation for a judgment rescinding the rescission, the find-

ing is substantially different from the allegation, and is insufficient to sustain such a judgment.

Furthermore, the allegation was not in the complaint as originally filed, nor was there a single word in such original complaint suggesting that the plaintiff desired to be relieved from the consequences of his action on the ground that he had been mistaken. Under the statutes of Arizona, an action for relief upon the ground of either fraud or mistake is barred by limitation unless brought within one year after the cause of action accrued. [Chapter ... 16 ... Laws of 1903]

The amended complaint was not filed until the 4th of January, 1908. The statute of limitations was pleaded in defendant's answer. [Folio 820.]

An action for relief upon the ground of mistake is a separate and distinct cause of action. It was not pleaded in the original complaint, and, therefore, the operation of the statute of limitation was not arrested by the filing of the original complaint.

Motes v. G. V. G. & N. Ry., 8 Ariz., 50;
68 Pac. 532.

Boudreaux v. Tucson Gas & Co., 13 Ariz.,
361; 114 Pac., 547.

In the latter case the rule stated in the former case is definitely adopted as the law of Arizona.

X.

The contract of May 20, 1903, between Steinfeld and the Silver Bell Copper Company being voidable at the election of the company, was annulled in its entirety by virtue of the resolution adopted at the stockholders' meeting on December 26, 1903, without respect to any subsequent action annulling or rescinding the same by the directors or officers of the company.

We respectfully submit that the good faith of the directors in passing the rescinding resolution, was wholly immaterial, for the reason that the contract had been legally avoided by the action of the stockholders and that therefore, the passing of the rescinding resolution by the directors was unnecessary.

We appreciate that the contracting power of a corporation is exercised not by its stockholders, but by its directors; but believe that any act of a corporation's officers, even if done without authority of the directors, is valid if ordered by the unanimous vote of all of the stockholders of the corporation.

The rule is often expressed in the authorities, that nothing short of action by all the stockholders in meeting assembled will in itself work a rescission of a contract, and by implication at least that when all the stockholders vote in rescinding a contract, their action in itself constitutes a valid rescission.

It has been held in numerous cases that the stockholders of a corporation may ratify a voidable contract, and we see no reason why the converse should not be true, and that a majority of the stockholders may repudiate a voidable contract.

It must be borne in mind that the rescission of the agreement of May 20th differs from an ordinary contract of rescission. A contract of rescission is as much of a contract as was the original contract which it sought to rescind; but the agreement of May 20th was voidable and it was subject to be annulled by the corporation without the consent of Steinfeld, and therefore, the annulling of it differs from a contract of rescission which necessarily implies the agreement of both parties. The act of repudiation, therefore, not being a contract, but a corporate act, was properly exercised by the stockholders. While we have found no authority expressly holding that the action of the stockholders can effectively repudiate a voidable contract without subsequent action by the directors, such right is apparently assumed by the courts in numerous opinions, and we believe has not been directly passed upon because it has never been questioned.

2 Cook on Corporations; 5th Ed., Sec. 709;
p. 172, and note;

Colorado Co. v. America Co., 97 Fed. 843,
at p. 853;

Metropolitan R. R. Co. v. Manhattan R.
R. Co., 14 Abbott's New Cases at....
p. 273;

Kirwin v. Washington M. Co., 79 Pac.,
928;

O'Conner M. & M. Co. v. Cussar Furnace
Co., 10 So., 290.

This should certainly be the rule where the act of repudiation is a resolution passed by the vote of every stockholder of the corporation.

XI.

The distribution made in pursuance of the resolution of January 16, 1904, cannot be impeached in this action, for the reason that no injury has been alleged or proven. While a corporation may under certain circumstances elect to avoid a contract made by directors with themselves, a minority stockholder may not avoid such contract except upon allegation and proof of injury to the corporation by such contract.

Counsel for appellant argued at length upon the first appeal that even if it be conceded that Steinfeld by virtue of the rescission became entitled to his proportionate part of the purchase price, still, all of the money which was given to him must be refunded by him to the corporation, for the reason that the resolution of January 16th, 1904, which authorized the distribution was void as

having been passed by directors under Steinfeld's dominion, and that therefore, the judgment must be reversed and judgment rendered in favor of the plaintiff.

It seems to us that there is no merit in this contention.

If the beneficial ownership of the English group of mines was vested in Steinfeld prior to the execution of the contract of May 20, 1903, and of said contract was rescinded on December, 1903, it is immaterial whether the passage of the resolution of January 16, 1904, agreeing upon an equal division of the proceeds of the sale of the entire group of mines, between Steinfeld and the Silver Bell Copper Company was obtained by the fraud of Steinfeld or not.

If Steinfeld had been in possession of all the unexpended proceeds of the sale of the entire group of mines at the time the contract of May 20, 1903, was rescinded, and if he had immediately after said rescission appropriated to his own use and benefit the amount of money and notes which were surrendered to him by the treasurer of the Silver Bell Copper Company on January 16, 1904, it seems too plain for argument that the Silver Bell Copper Company could not have secured judgment against him for any part thereof unless it could establish either that the beneficial ownership of the English group of mines or of the 300 shares of Nielsen stock was vested in it

prior to May 20, 1903, by reason of facts other than the execution of said contract, or that the amount of money and notes so appropriated to his own use and benefit by Steinfeld was in excess of the amount of the share of all the proceeds of the sale of the entire group of mines to which Steinfeld was entitled. In other words, if Steinfeld was the true, beneficial owner of the English group of mines, he was the consequential owner of a part of the entire proceeds of the sale, and was entitled to appropriate that part of the proceeds to his own use and benefit, and the Silver Bell Copper Company could not recover judgment against him for so doing. If he appropriated more than his proportionate share of the entire proceeds it could recover judgment for the amount of that excess only.

It cannot recover judgment against him except by proving that it is the rightful owner of all or of a part of said proceeds of sale which have come into his possession, and it can only recover judgment for so much of said proceeds as it proves itself to be the rightful owner of. [See *Alsbrook v. Shields*, 67 N. Car. 333.]

To us, the proposition of the learned counsel seems startling.

If it be sound law, then, as a matter of law, any court must enter judgment annulling any such contract upon the application of *any* stockholder. If the directors of a corporation had made a set-

tlement with a fellow director, largely to the advantage of the corporation and desired by a vast majority of the stockholders, still, according to this contention, a single stockholder, by instituting an action could force the court to declare the settlement void; the director could then prosecute his claim against the corporation and might recover three or four times as much as he had agreed to take, and all of the other stockholders, who were pleased with the settlement, would lose large sums of money, because one stockholder had objected.

Such a theory strikes at the root of corporate law.

It is asked that the court without regard to the eventual determination of the matters at issue, decree that all of the money be placed in the treasury of the corporation, even though it be decided that Steinfeld was the owner of the English group of mines and entitled to his proportion of the purchase price. When this shall have been done, then a "judicial distribution" will ensue.

In such a distribution Steinfeld may receive more, and the corporation less than under the distribution of January 16th, and the corporation may be injured by this entire procedure.

It is alleged in the complaint that Zeckendorf is the "SOLE complaining stockholder," and this is the unquestioned fact.

In the absence of an allegation in the complaint

that the distribution was an unfair and inequitable one, it is not competent for a court to set aside such distribution on the ground either that Steinfeld was a director or that Shelton was his dummy.

It will be conceded at the outset of this discussion that there is conflict in the decisions as to whether a contract made by a director with himself is void or voidable. Much of this conflict, however, arises from the use of the word "void" in two senses.

One sense of the word "void" is absolute nullity. The courts, however, use the word in another sense, and mean by a void contract such a contract as a corporation may elect to declare void *without assigning any reason therefor*. The distinction between a void contract in this latter sense and a nullity is obvious. If the contract were a nullity it would require no action on the part of the corporation or any of its stockholders to avoid it. If, on the other hand, it is not a nullity, the corporation, even though it have the right to avoid it without assigning any reason therefor, may, if it so elect, hold to the contract, and in such event, the contracting party who procured it to be made would be bound by it.

A contract of a corporation made by its directors with all or one of themselves is never a nullity.

Such a contract by the weight of authority cannot be declared void at the mere election of the corporation, but some slight ground for avoiding it must be assigned. Such is the doctrine of this court.

Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

There is authority, notably the Supreme Court of Michigan, that such a contract may be declared void by the corporation without assigning any reason therefor.

Miner v. Belle Isle Co., 17 L. R. A. 412.

In the Belle Isle case such contracts are called "absolutely void."

It is submitted, however, that the court does not mean by absolutely void that it regards such contracts as a nullity, but only means that they are void in the sense that the corporation may declare them void without other reason than its election to do so.

The reason for this distinction is an obvious one. The right of the corporation to hold the director to the contract which he has made with the corporation may be a substantial one. If the contract were a nullity, the director could not be held to it, and the law under no circumstances will deprive the corporation of its right to elect as to whether such contract shall maintain or not.

In the case at issue the contract created by the resolution of January 16th is not a nullity.

Under the decision of the Supreme Court of the United States in the Twin Lick case, *supra*, even if the corporation itself had elected to declare the contract of January 16th void it could not procure it to be judicially avoided without alleging and proving some "slight ground" therefor.

The proposition that a minority stockholder may ask a court to treat such a contract as a nullity or to declare it void without alleging its unfairness is without the support of any authority of any court.

The distinction between the right of the corporation itself to elect to avoid such a contract, and the right as a minority stockholder acting in behalf of the corporation so to do, is most ably discussed in the case of *MacNaughton v. Osgood*, 41 Hun., p. 109, at pp. 110-111.

In that case the three directors of a corporation fixed by resolution the salaries and compensation to be received by themselves respectively as secretary, treasurer and vice president of the corporation.

The court says:

"It is possible that a contract so made may be in the highest degree beneficial to the corporation and the law does not disable it from adopting its benefits.

"It follows that the resolutions adopted by these three directors, fixing the salary of

one of them as president, and of the other as secretary and treasurer and providing somewhat indefinitely for the compensation of the third as vice president, are not binding upon the corporation. The corporation is under the control of these three directors, and thus has presumably been disabled from exercising its right to exercise its election to adopt or avoid these resolutions.

"The plaintiff, by this action, brought the corporation and its three directors into court, and asks, upon substantially an undisputed state of facts, that the resolutions be avoided and the salaries paid under them be restored to the treasury. Under the circumstances, the corporation should be adjudged to do and receive what the evidence shows it is just that it should do and receive. The plaintiff, by bringing the action, undertakes to make out a case. He contends, however, that having shown the fiduciary relation of the directors, and that they adopted these resolutions to their own advantage, and have received their pay in pursuance of them, that the presumption is that they acted dishonestly, and that the burden rests upon them to overcome, by affirmative evidence, this presumption.

"Now, if the corporation had elected to rescind these resolutions and had brought its action to recover the salaries paid under them, doubtless the burden would have rested upon the directors to overthrow the presumption, if, in any aspect of the case, it would be material to do so. *But the plaintiff is a volunteer champion of the cause of the corporation.* The court does not interfere in the management of a corporation, except in a clear case demanding such interference.

(Barnes v. Brown, *supra*; Chautauqua Co. Bank v. Risley, 19 N. Y. 381; Hawes v. Oakland, 104 U. S. 460.)

"It is not clear from the simple fact that the directors voted themselves salaries and received them, that the corporation has been injured. It is conceivable that this action was beneficial to the corporation. * * *

"The plaintiff is not the corporation, his right to champion its interests must rest upon his showing affirmatively that it needs him somewhat in the character of its guardian ad litem to bring it into court for its proper protection, and hence the burden rests upon him to make such a case as will show that the corporation ought to exercise its right to avoid the resolution or contract made by its directors, in which they were personally interested.

"There is a plain distinction between a case in which the corporation may, at its option, avoid such a contract, and a case in which the corporation, from the fact that it is despoiled and in the hands of its spoilers, ought to be adjudged to avoid it. The plaintiff made the former case, but not the latter, and hence the judgment should be affirmed."

It is for "the court to decide whether the contract is a fair one or not, with power to set the contract aside if it is manifestly unfair."

"* * even though the boards of directors of two corporations are the same, and one buys out the property of the other, yet the transaction is not void, and will not be set

aside at the instance of a stockholder *unless he shows damage.*"

2 Cook on Corp., Sec 658, 5th Ed., p. 1512;

Smith v. Ferries, 51 Pac., p. 710.

"If the minority stockholders object to the contract the court will consider it and will sustain it if fair and set it aside if unfair."

Lyman v. Kansas City R. R., 101 F. 636.

"In the absence of fraud *and unfairness* the minority may not defeat the whole body of associates respecting the security common to all." (Shaw v. R. R. Co., 100 U. S. 605.)

"It is well settled that a director may deal with his corporation. He may advance it money by way of loan or sell it property. Such contracts are voidable at the instance of the beneficiary, but are not void, and in order to avoid them injury must be shown."

Copsey v. Sacramento Bank, 66 Pac., p. 8.

The action of the directors on the 16th of January, 1904, in apportioning the purchase price between Steinfeld and the Silver Bell Copper Company was not an agreement in the sense of a contract between two parties which initiates rights. It was not contemplated by either Steinfeld or the directors that either party for consideration passing from one to the other, should become vested with any right which had not theretofore existed.

The theory of that meeting was that Steinfeld on such day was entitled to a portion of the purchase price, the amount of which was dependent upon the ratio of the value of the English group of mines to the value of the Old Boot group of mines. The board of directors simply acknowledged and fixed this ratio. It was a compromise and nothing more.

To hold that the board of directors had no power to establish the ratio of distribution is an absolute absurdity. This absurdity is manifest upon reflection. A director is entitled to an undetermined proportion of certain moneys in the hands of a corporation. Both he and the other directors are willing and prepared to adjust the same upon a basis mutually satisfactory.

It is a marvelous proposition that the directors must go to the expense of an appeal to the courts, and although able to agree with each other, the law will not permit them so to do.

It would seem that the mere statement of this proposition is its refutation.

The directors, and they only, had the right to adjust this matter with Steinfeld. He being a director himself, it is conceded that if the adjustment were unfair or inequitable, and *it were so alleged*, the action of the directors should be scrutinized.

In the case of *Hodge v. United States Steel Corp.* 64 N. J. Eq. 111, 54 Atl., at page 3 the court says:

"It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders and not void *per se*. Under the declaration of this court in the case last cited the shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract.

* * *

As said in the opinion of the Supreme Court:

"There is no showing that the amount paid Steinfeld under this resolution as his part of the proceeds of the sale due him as the owner of the English group of mines was in excess of what he should have been paid, nor was it shown that the distribution was prematurely made. *The pleadings do not raise this issue, on the contrary, by stipulation of counsel, all testimony which had been put in upon the first trial as to the relative values of the Old Boot and English group of mines was eliminated upon the grounds that the complaint proffered no issue as to such values.*"

[Trans. pp. 452-3, fol. 1105.]

SECOND CAUSE OF ACTION REGARDING THE 300 SHARES OF STOCK.

The Complaint.

In setting forth the second cause of action, the plaintiff first repeats all of the allegations in his first cause of action set forth, and then adds:

"That on or about the 29th day of June, 1900, Albert Steinfeld, defendant above named, advanced to and for the benefit of said Silver Bell Copper Company, the sum of two thousand (\$2,-

000.00) dollars, for the purchase by the said Albert Steinfeld, as the trustee and managing agent of said Silver Bell Copper Company and for the use and benefit of said Silver Bell Copper Company, the said three hundred shares of stock issued to and belonging to said Carl Nielsen and for the purchase from said Carl Nielsen and one Lewis of those two certain mines mentioned in this complaint and known as the Accident and the Black Rock, and at the same time for said corporation entered into a contract with said Carl Nielsen and his wife, Mary Nielsen, by which he agreed to pay to said Carl Nielsen and Mary Nielsen the further sum of ten thousand (\$10,000.00) dollars," etc. [Folio 807.]

"That thereupon and thereafter said Albert Steinfeld, by writing executed to said Silver Bell Copper Company, signed by him, acknowledged and declared that he held said stock in his name as trustee, as aforesaid, and for the purposes aforesaid." [Folio 808.]

The allegations with respect to the three hundred shares of stock set forth in the first cause of action, and by reference made a portion of the second cause of action, are as follows:

" * * * Prior to the 20th day of May, 1903, three hundred shares of the said stock were purchased by said corporation, the same being taken in the name of Albert Steinfeld, trustee; that at all times after said purchase, said Albert Steinfeld held said stock in his possession as trustee as the property of and for the benefit of said corporation", etc. [Folio 737.]

"That thereupon, and on or about the 29th day of June, 1900, said Albert Steinfeld, as such agent or representative of and for the benefit of the said Nielsen Mining and Smelting Company,

purchased from the said Carl Nielsen the said three hundred (300) shares of stock belonging to said Carl Nielsen, and purchased from said Carl Nielsen and one Lewis two certain mines and all mines and mining claims that said Carl Nielsen might have in the mining district in which were located said Mammoth or Old Boot mine", etc. [Folio 755.]

Then follow the allegations that a dividend of \$1111 a share was declared upon said stock, and that Steinfeld received and retained the same to his own use.

It is not alleged in the complaint that Steinfeld shut down the mine in order to acquire the 300 shares of stock either for himself or for the company, although it is alleged:

"And said mines were closed down by said Albert Steinfeld solely and exclusively, as above alleged, for the purpose of enabling him (as the agent or representative of the Nielsen Mining and Smelting Company) to acquire said English group of mines and the Volkert and Francis titles thereto, *and of getting rid of said Carl Nielsen.*" [Folio 755.]

It appears that the complaint does not attempt to set forth facts tending to establish that Steinfeld became by reason of the purchase of the stock a trustee *in invitum*. In order, therefore, that the judgment with respect to these three hundred shares of stock may stand, it is necessary that under the facts found Steinfeld, as a matter of law, held the stock as express trustee.

The findings bearing upon the second cause of action are fully set forth in the statement of facts.

Assignments of Error.

I.

The Supreme Court erred in affirming the judgment of the District Court in favor of plaintiff-appellee, upon the first (should be second) cause of action in the complaint set forth, for the reason that upon the facts found by the court, defendants were entitled to judgment upon such cause of action.

II.

The Supreme Court erred in affirming the said judgment for the reason that the 300 shares of stock, the subject matter of the said cause of action, together with other property were, as alleged in the complaint, purchased for the sum of two thousand dollars (\$2,000) in cash, and ten thousand dollars (\$10,000) to be thereafter paid, for which sum of ten thousand dollars (\$10,000) the appellant Steinfeld was personally obligated. The two thousand dollars (\$2,000) so paid was the personal property of the said Steinfeld and was not loaned by him to the defendant-appellant, the Silver Bell Copper Company, and the said Silver Bell Copper Company was at no time obligated to re-pay the same to said Steinfeld, and declined to obligate itself to re-pay the same to

the said Steinfeld and at no time agreed with said Steinfeld that it would pay said \$10,000 to the said Nielsen. Therefore, as between the said corporation and the said Steinfeld, the said Steinfeld was primarily obligated to pay the said ten thousand dollars (\$10,000) to Nielsen as the purchase price of the said stock, and the said stock was at all times the property of the said Steinfeld.

III.

The Supreme Court erred in affirming the said judgment for the reason that even if the said stock was held by Steinfeld as trustee for the said corporation, it was the duty of the said corporation and its officers to pay the dividend upon the said stock to the said Steinfeld, and the payment of the amount of the dividend to the said Steinfeld was not an act of corporate malfeasance, and is not collectable in this action.

IV.

The Supreme Court erred in affirming the said judgment appointing a receiver, for the reason that even if Steinfeld held the said stock as trustee, the payment of the said dividend was, for the reasons set forth in the foregoing assignment (not) an act of corporate malfeasance, and therefore, there was no ground for the appointment of a receiver.

V.

The Supreme Court erred in affirming the said judgment, for the reason that the facts found by the court are not sufficient to support a judgment founded upon the allegations of the complaint.

ARGUMENT.

I.

Neither the Findings nor the Evidence are Sufficient to Support the Judgment.

The material allegations of the complaint are:

First: That Steinfeld advanced to the corporation \$2,000, in order that the corporation acting through himself as its agent, might purchase the 300 shares of stock and the Accident and Black Rock mines.

Second: That when Steinfeld entered into the contract of June 29, 1900, with the Nielsens, he was acting for the corporation.

Third: That Steinfeld thereafter, *in writing*, acknowledged and declared that he held said stock as trustee for the corporation.

The facts alleged in the foregoing first and second paragraphs taken together are sufficient to constitute an express trusteeship.

The fact alleged in the third paragraph is either a mere allegation of evidence, to-wit, that Steinfeld admitted that he was an express trustee, as alleged in the first two paragraphs, and therefore, adds nothing to such allegations, or else

constitutes an allegation that Steinfeld after the transaction with Nielsen made a written declaration of trust whereby the beneficial title was transferred by him to the corporation.

There is no finding that Steinfeld advanced or loaned \$2,000 to the corporation or that he signed the contract of June 29th, 1900, for the benefit of the corporation, or that he at any time made a declaration of trust.

The finding "that the \$2000 paid by Steinfeld, at the time of the purchase of the said 300 shares of stock was the personal money of said Steinfeld, and that said Zeckendorf knew that Steinfeld had paid the same out of his own money, for and on behalf of the corporation" cannot and should not be construed as a finding by the court that as a matter of fact the \$2000 was paid by Steinfeld for and on behalf of the corporation.

The words italicized are merely a qualification of the prior portion of the finding and are inserted to indicate that Zeckendorf's knowledge that the \$2000 was the money of Steinfeld, did not estop him from claiming that Steinfeld held the stock as trustee. The purport of the finding is that Zeckendorf's knowledge that the money was Steinfeld's was coupled with his belief that Steinfeld had paid the money for the benefit of the corporation.

Zeckendorf testified that Steinfeld told him that he had paid the money for the benefit of the

corporation. Steinfeld testified that he never told Zeckendorf anything of the kind. Steinfeld's admission as sworn to by Zeckendorf would undoubtedly be evidence tending to establish the fact that Steinfeld had advanced the \$2000 to the corporation; but in view of other testimony in the case, the court was unwilling to find as a matter of fact that Steinfeld did advance the \$2000 to the corporation, and contented itself with a finding which, as has been said, qualified the fact of Zeckendorf's knowledge that the \$2000 was Steinfeld's personal money, and prevented such knowledge from being a bar to Zeckendorf's contention with respect to the beneficial ownership of said 300 shares of stock.

Certainly, had the court intended to find this vital and material fact as alleged in the complaint, the plaintiff would have drawn an express finding establishing in unambiguous language the fact that Steinfeld had advanced or loaned the \$2000 to the corporation, in order that the corporation might therewith make the purchase of the stock, and the obvious deliberate failure of the court to make such finding, should preclude the plaintiff from contending for so tortuous a construction of the words under consideration.

If our construction of the finding under consideration be accepted, then it is again submitted that the findings are not sufficient to sustain those allegations of the complaint which are essential to the maintenance of the judgment.

The finding that "Steinfeld took said 300 shares of stock in his name as 'trustee' and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company, said Silver Bell Copper Company during all such times and now being the equitable and real owner thereof," adds nothing in support of the allegations of the complaint and the judgment.

This finding in fact means nothing. The last clause is a conclusion of law. The words "that said Steinfeld took said 300 shares of stock in his name as trustee, "if they mean that Steinfeld upon the purchase of the stock had a certificate issued in his own name as trustee, are absolutely contradicted by the prior finding that it was not until January, 1901, over six months after the purchase, that the stock was transferred into the name of Steinfeld, trustee. [Folio 1143.] If they are qualified by the succeeding words and mean that after January, 1901, he held the certificate in his name as trustee, then they do not sustain the allegations of the complaint, and do not support the judgment.

The allegation is that Steinfeld purchased the stock as agent of the corporation, and with money advanced by him to the corporation for its benefit, and for the purpose of making such purchase. The evidence is that the stock certificate in Nielsen's name was sent by Steinfeld to Niel-

sen by Cooper, notary public, and that Nielsen endorsed it to Steinfeld, and that it was brought back and put in the stock book; that Zeckendorf found it there in January, 1901, and that Zeckendorf wrote out a certificate of stock in the name of Steinfeld trustee, and procured Shelton and Curtis to sign the same, and that Zeckendorf wrote on the back of the stub, in his own handwriting, a statement to the effect that Steinfeld held the stock as trustee for the corporation. Zeckendorf testifies that he did this with Steinfeld's knowledge and consent, and this Steinfeld denies. The court has not undertaken to find upon the issue of fact thus raised between Zeckendorf and Steinfeld, and there was no necessity for its doing so. It is not alleged that Steinfeld transferred the beneficial interest in the stock on January 19th, 1901, when the certificate was written out by Zeckendorf, nor can it be held that that transaction supports the allegation in the complaint that Steinfeld acknowledged and declared that he held the stock as trustee for the corporation, for the allegation is that Steinfeld "thereafter *in writing*" so acknowledged and declared, and the plaintiff necessarily has reference to the proposition of July 15th, 1901, which was the only instrument in writing which was executed by Steinfeld prior to the 20th of May, 1903.

It is obvious, therefore, that the judgment cannot be sustained except upon the theory either

that the trust was created at the time of the transaction with Nielsen, or by virtue of the proposition of July 15th, 1901.

On the 29th day of June, 1900, when the certificate of stock was delivered by Nielsen to Steinfeld and the \$2000 paid by Steinfeld to Nielsen the title to the stock passed from Nielsen and vested either in Steinfeld individually as claimed by us or in Steinfeld as trustee for the corporation as claimed by the plaintiff. The issue of the certificate six months thereafter, in the name of Steinfeld might have weight as evidence of an admission, but could not under the allegations of the complaint be effective to support a transfer of the beneficial interest in the stock from Steinfeld to the corporation.

The finding last quoted that Steinfeld took the three hundred shares of stock in his name as trustee, and all times after January 19th, 1901, held it in his name as such trustee, is the only finding tending to support an express trusteeship.

The words "in his name as trustee" plainly refer to the issuance of a certificate in his name. Otherwise, the words "in his name" would have been omitted.

As was stated at the outset this finding, upon which the plaintiffs must rely exclusively, means nothing. The only fact in it is that a certificate was issued on the 19th day of January, 1901, written out in the name of Steinfeld trustee.

Suppose he did take it in his name as trustee. Suppose he had taken it in his name as trustee at the time of the purchase. That would not have constituted him a trustee. It would have been evidence, as an admission, that at such time he intended a trusteeship, and if done at the time of the transaction, which it was not, it would have been most persuasive as to his intent at such time, and the court would have been more than justified in finding upon such evidence that when he bought it he acted as agent for the corporation; but the court has made no such finding; and such finding, if it had been made, would not have been sustained by the evidence in this case. One can search the findings in vain for a suggestion of any fact or inference that the corporation had an equitable interest in the stock prior to the 19th of January, 1901.

We do not believe that this court will go further than the findings and seek into the evidence to ascertain whether there be sufficient evidence to sustain a finding, if one had been made. If, however, this court should so do, it is submitted that no evidence will be found sufficient to sustain a finding which would support a judgment founded upon the complaint.

The Transaction with Respect to the Three Hundred Shares of Stock.

The confusion arises out of Franklin's interpretation of the contract with Nielsen expressed in the proposition of July 15th, 1901. The circumstances of the preparation of this proposition by Franklin and of Steinfeld signing it were fully set forth in the statement of facts.

The Niensens sold two things; the 300 shares of stock and two mining claims. The purchase price consisted of two items; two thousand dollars and ten thousand dollars to be thereafter paid, which ten thousand dollars upon the face of the agreement was the joint obligation of Steinfeld and the corporation. Franklin inferred that the contract with the Niensens really embraced two severable contracts; one the purchase of the mining claims for two thousand dollars, and the other the purchase of the stock for the ten thousand dollars to be subsequently paid, and in the proposition as prepared by him, Steinfeld in terms so says. The language is:

"At the time of the execution of this agreement (June 29th, 1900) I personally paid the said Niensens out of my own money the sum of two thousand dollars, which was in payment of the quitclaim deed executed to me, and it was at the same time agreed by Mr. J. M. Curtis, your president, and myself, that the 300 shares of stock assigned to me by the Niensens should be held by me in trust until the purchase price thereof, to-wit, ten thousand dollars, was paid by the Niel-

sen Mining and Smelting Company, as per the agreement.”

If it had been alleged in the complaint that the consideration for the three hundred shares of stock was the ten thousand dollars, certainly the indications would be as stated in the opinion of the Supreme Court, “That he bought the shares of stock for the company.” Even in such event, however, such language employed in the proposition of July 15th would be nothing more than an admission, and in our opinion would have been more than counter-balanced by the entries in Steinfeld’s personal books made at the time of the purchase, which show conclusively that the two thousand dollars was paid for the 300 shares of stock, and that the stock was purchased by Steinfeld as a personal investment.

The plaintiff doubtless appreciated that these entries in Steinfeld’s personal books, made at a time when there could have been no possible idea in Steinfeld’s mind to defraud or take advantage of the company, constituted evidence which would in the mind of the court outweigh even the direct admission in the proposition of July 15th, and therefore it was alleged in the complaint that the two thousand dollars was part of the consideration for the purchase of the stock. This allegation, in flat contradiction of the fact contained in the proposition which was the basis for Franklin’s conclusion with respect to the legal relations

arising out of the transaction, totally destroys the effect of such admission.

The court must take the facts as found; and without respect to even Steinfeld's opinion of his legal rights, howsoever expressed, determine what in fact were Steinfeld's legal rights at such time. It must always be borne in mind that the motive for the purchase of the stock was not a desire for its acquisition, but a desire to get rid of Nielsen. Intrinsically the stock was not regarded by any of them as having any particular value. The entire evidence shows that both Steinfeld and Zeckendorf would gladly have disposed of the properties for the amount of the indebtedness to Zeckendorf & Co. Steinfeld believed, right or wrong, that the interests of the company required that Nielsen should be gotten rid of. [Fol. 282, page 273; fol. 651, page 274; fol. 654.]

Under these circumstances, there is but little doubt that Steinfeld not only would have been willing, but would have been glad to have the company pay him the two thousand dollars and take over the stock, just as he was willing that the company should reimburse him and take over the English group of mines. The precise legal relations were not considered, or believed to be worth considering.

Steinfeld entered these purchases as investments, not with purpose to defraud the company of valuable purchases which should have been

made for its benefit, but, on the contrary, with the particular purpose not to disadvantage the company by saddling upon it an indebtedness to which he knew Zeckendorf would object. Steinfeld both intended and hoped that the company would take over the properties, but he did not believe that in fairness to the company he had the right to compel it to do so, and therefore, though the company was, as has been elaborately argued, greatly benefited by Steinfeld's investment, he, himself, stood the outlay and assumed the risk.

When after the first conversation with Franklin prior to May, 1901, Franklin advised him that he was trustee, he naturally concluded that if trustee he was entitled to reimbursement, and he thereupon wrote Curtis the letter of May 19th, 1901, set forth in the statement of facts, in which he demanded his interest. When Franklin told him that he had no right to saddle this indebtedness upon the company he sent back the identical checks. [Finding folio 951.] He was compliant and acquiesced in whatever advice or instruction Franklin gave in the premises.

Out of these facts and these conditions it is the province of the court to evolve the legal relations. The facts are that the two thousand dollars was part of the purchase price for the stock, and that such two thousand dollars was Steinfeld's personal money. It is alleged that this two thousand dollars was advanced by Steinfeld to

the company, but such allegation is not sustained by any finding, and is not sustained by the evidence. The two propositions cannot be divorced; either the corporation owed Steinfeld two thousand dollars or else the stock belonged to Steinfeld.

The language of the contract whereby the company was obligated to pay Nielsen the ten thousand dollars unquestionably indicates that Steinfeld hoped that the company would take the purchase off his hands, but the contract was an entire one and the company could only take it off its hands by taking it all off of his hands, to-wit, by paying the two thousand dollars. When at Franklin's advice the company expressly refused to take the contract off of his hands by refusing either to agree to pay him the two thousand dollars, or to assume the obligation to Nielsen, the legal relationship became established. The stock and the two mining claims belonged to Steinfeld, and he owed Nielsen the ten thousand dollars. If, under the circumstances, Nielsen could have held the company liable, still the liability was primarily that of Steinfeld, and between Steinfeld and the company, Steinfeld would have been compelled to make the payment. The concluding words of the proposition of July 15th have no effect to change this status. They are as follows:

"The 300 shares of stock in the Nielsen Mining & Smelting Company, however, I will in any

event continue to hold under our joint agreement with the Nielsens in regard thereto, *unless you wish to disaffirm the agreement as made by your president in regard thereto.*" [Folio 1173.]

This was an admission consisting of Franklin's conclusion induced by his mistaken belief that the two thousand dollars was paid for the mines, and not for the stock. Furthermore, even this language bears upon its face the predominating notion, insisted upon by Franklin and accepted by Steinfeld, that the company was not obligated to pay the Nielsens the ten thousand dollars and that it retained the right to determine whether it would or would not be a party to such contract. The only actual obligation incurred prior to the contract of May 20th, 1903, was that of Steinfeld personally. It is a well recognized principle of law that

"The admissions of a party under a misapprehension as to his legal rights do not affect his interest."

1 Am. & Eng. E. of Law, 2d Ed., p. 714,
end of note 3;

Morse v. Hitchcock, 4 Wend. 292;

Solomon v. Solomon, 2 Georgia 18;

Rowen v. King, 25 Pa. St. 409.

As was suggested in the statement of facts, the Supreme Court was undoubtedly misled by the peculiar language of the finding that Steinfeld "took" the stock in his name as trustee, and in-

ferred that at the time of the purchase, as stated in its opinion, "the transfer of the stock was made from Nielsen to Steinfeld as trustee."

If such had been the case the inference from the entire transaction that Steinfeld bought the stock for the benefit of the company would not have been an unfair one.

We submit in conclusion:

First: That Steinfeld's intent in making the purchase of the stock was the same as his intent in purchasing the English group as set forth in finding XIII., [Folio 1160], and

Second: That whatever may have been his intent it was a *legal impossibility* for him to have become an express trustee at the time of such purchase unless this court should supply a finding, which the courts below have refused to make, that the two thousand dollars was a loan made by Steinfeld to the corporation, and which the corporation was obligated to repay. If it should be determined that Steinfeld was the beneficial owner of the 300 shares of stock, then he remained such until the 20th day of May, 1903, on which day he transferred the same to the Silver Bell Copper Company in consideration of the company's assumption of the obligation to Nielsen and its payment to him of the two thousand dollars, which two thousand dollars with interest was a part of the \$18,117 which was the consideration for the agreement of May 20th, 1903.

The annulling of this agreement re-established the ownership of the stock in Steinfeld. Our argument upon the appeal from the first cause of action applies to the circumstances and effect of this annulment or rescission.

III.

The allegation that thereupon and thereafter said Albert Steinfeld by writing executed to said Silver Bell Copper Company, signed by him, acknowledged and declared that he held said stock in his name as trustee, as aforesaid, and for the purposes aforesaid, is not sustained by the evidence or supported by any finding.

If this allegation be regarded as a mere evidential fact, pleaded by the plaintiff in support of his allegation of the ultimate fact that Steinfeld purchased the stock for the benefit of the corporation, then it is disposed of by what has been heretofore said.

If, on the other hand, it be regarded as an allegation of an act of Steinfeld divesting him as an individual of the beneficial ownership of the stock, and transferring such ownership to the corporation, then we submit, it cannot support the judgment, for there is neither evidence nor finding to sustain it.

IV.

Even if Steinfeld held the 300 shares of stock as trustee for the corporation, judgment in this action was improper.

Concede plaintiff's contention to be true, and what follows?

It is a well established principle of law that dividends should be paid to those in whose name the stock stands upon the books of the company.

Jones v. Terre Haute R. R. Co., 17 How.
Pr. 529.

The allegation in the complaint which controls the character of this action, is as follows:

"And this plaintiff now brings this action as a stockholder for said defendant corporation, for its use and benefit, and in order that its property *illegally taken* from it as hereinafter set forth, may be recovered and restored to its assets." [Folio 741.]

"That said defendants Shelton and Curtis and said Albert Steinfeld, as officers of said corporation, well knew that in paying the said Albert Steinfeld the said dividend, they were violating their trust and obligation as directors and officers of said corporation, and that said Albert Steinfeld had no right to the same." [Folio 810.]

The check was paid to Albert Steinfeld as trustee [Folios 154-157.] Under Franklin's testimony heretofore quoted and under Zeckendorf's testimony [Folio 195] the stock was issued to Steinfeld as trustee, to secure him upon his obligation to see that the Nielsens received the \$10,-

ooo. Steinfeld, therefore, had the right to receive the dividend check, and it was the duty of the corporation to issue it to him. If the stock had not belonged to Steinfeld individually, then after cashing the check and paying Nielsen \$10,000 it became his duty to return the balance to the corporation; but he had the right to cash the check, and the money was not *illegally taken* from the corporation, and therefore, under the allegations of the complaint, even though Steinfeld held the stock as trustee for the corporation, the judgment rendered against him in this action should be reversed.

Zeckendorf himself drew the certificate in the name of Albert Steinfeld, trustee. The drawing of the check was a corollary from Zeckendorf's action. The delivery of such check was equally a corollary, and Steinfeld's reception of it was not, even upon plaintiff's evidence, improper. He endorsed it as Albert Steinfeld, trustee, and cashed it, and still no illegality can be alleged. He kept the money. Here and now, and not before, even upon the theory of the plaintiff, he did wrong. But who did wrong? Not the corporation, but Steinfeld, individually, who appropriated to his own use the money which had been legitimately paid to him by a corporation and which it was his duty to account for as trustee. The transaction cannot be trotured into a corporate malfeasance. Steinfeld, if all which the plaintiff contends for

be admitted, converted to his own use cash which he properly received as trustee. A stockholder's action, such as this, can only be sustained for actions of corporate malfeasance, and to redress such wrongful acts as are set forth in the complaint.

V.

The Court Erred in Appointing a Receiver.

If the reasoning in the foregoing point should not be accepted, nevertheless it is insisted that the court erred in appointing a receiver. The act of the corporation in drawing a check for the dividend, to the order of Albert Steinfeld, trustee, and handing it over to Steinfeld, was not an act of corporate malfeasance, but on the contrary was its duty.

If Steinfeld, after paying Mrs. Nielsen \$10,000, misappropriated the balance of the proceeds of the check, a cause of action would lie against him by the corporation.

As we have argued in the preceding point, we do not believe that recovery could be had against Steinfeld for the balance of the proceeds of the check in this action, but we respectfully insist that under no aspect of this transaction did the corporation do any wrongful act such as is necessary in order that the court may deprive it of the management of its affairs.

Conclusion.

The equities in this case are all with Steinfeld. While managing partner, he was junior partner. He had expended large sums of money in a speculative enterprise, not germane to the regular business of the firm; and Zeckendorf continuously rebuked him for having permitted the co-partnership to become so involved. He believed that the property could be worked out, and the indebtedness to Zeckendorf & Company paid off, if he could get rid of Nielsen and acquire the English group of mines. This cost money and labor. He had no thought on earth of making a profit, but he did not dare to advance more of Zeckendorf & Company's money in this venture; so he put up his own money and bought the stock and the mines. Zeckendorf knew of both investments, but never offered to take part in them.

Steinfeld acquiesced in the advice of Franklin, in whom he had the utmost confidence, but who was also the attorney for L. Zeckendorf & Company and for the Silver Bell Copper Company. The court has found that in these transactions Franklin was in no way influenced by Steinfeld. [Finding, 4.2] The result was the liquidation of the indebtedness and a handsome profit. His splendid achievement brought from Zeckendorf abuse and misrepresentation. He attacked

Steinfeld's business integrity by his instructions to the bank in California and by the attachment suit. To Steinfeld his business integrity was a part of his nature. In San Francisco he offered to abandon his rights under the agreement, to give to Zeckendorf an immediate dividend and to meet all of his demands with the sole condition that Zeckendorf should go to the bank and make amends. This Zeckendorf refused to do, and instituted his second suit accusing Steinfeld of fraud and robbery and misappropriation. From that time on their relations were not those of co-partners; they treated each other at arm's length. Each acted at all times with his personal lawyer at his side. Zeckendorf was under the advice of two eminent counsel. He came to the stockholders' meetings with full knowledge of everything and he came there with a lawyer. He himself offered the annulling resolution and he voted for it. There can be no question but that the effect of the rescission of the agreement was to reinvest in Steinfeld the proceeds of these properties. The result was as a matter of fact a re-establishment of Steinfeld's legal rights. If he could have satisfied a court of equity, as he has the Supreme Court, that he made the proposition of July 15th and entered into the agreement of May 20th under the advice of Franklin that it was his legal duty so to do, a court of equity would have relieved him from such agreement.

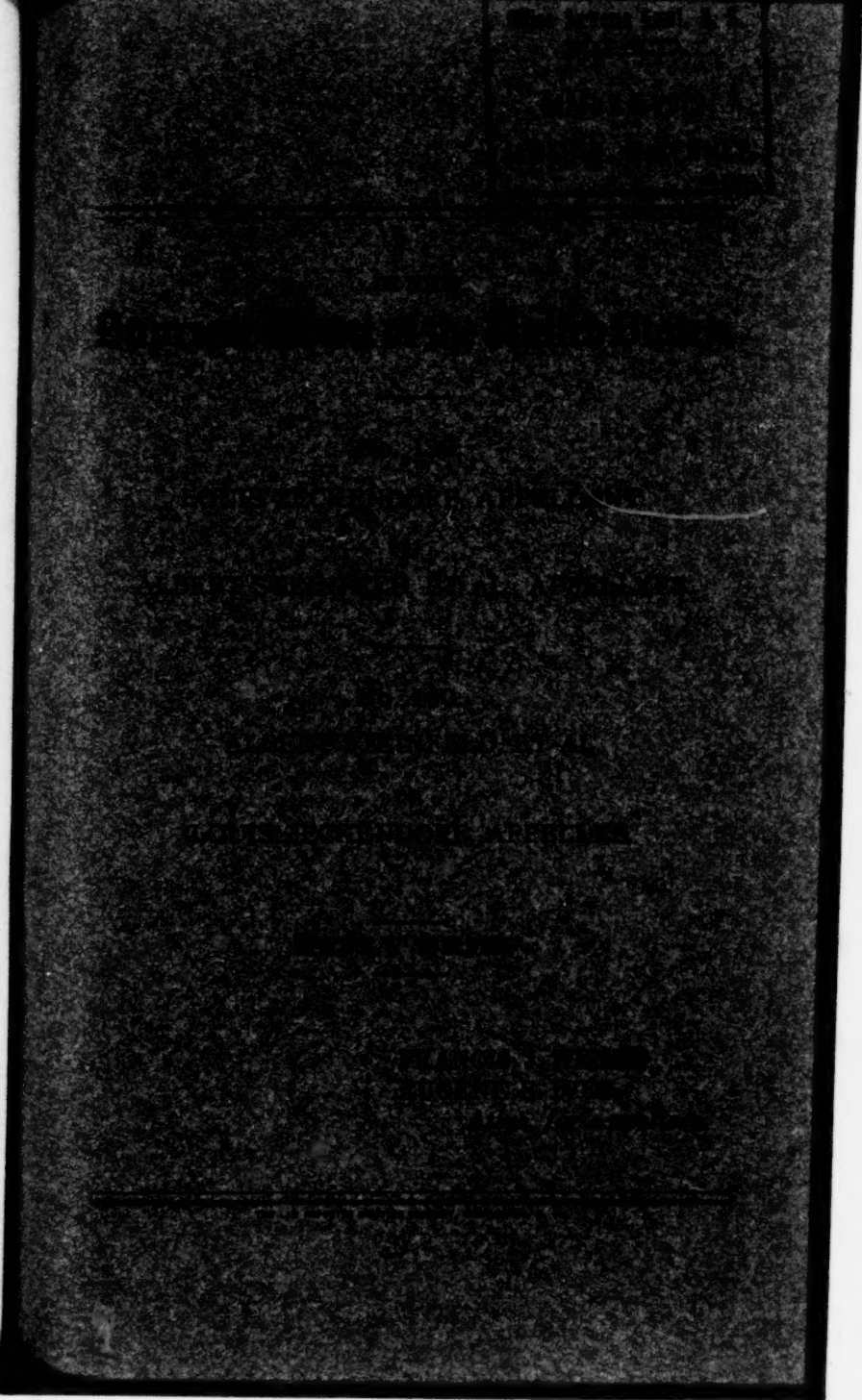
(2 Pomeroy Eq. Jur., Par. 843, 849, 847.) The net result, therefore, of Zeckendorf's action and of the rescinding resolution has been only to give to Steinfeld that which really belonged to him.

We respectfully submit that the judgment on the first cause of action should be affirmed and the judgment on the second cause of action should be reversed.

EUGENE S. IVES,

Attorney for Defendants.

Dated Tucson, Arizona, Jan. 15, 1912.



IN THE
Supreme Court of the United States.

No. 139.

LOUIS ZECKENDORF, APPELLANT.

vs.

ALBERT STEINFELD, ET AL., APPELLEES.

No. 140.

ALBERT STEINFELD, ET AL.

vs.

LOUIS ZECKENDORF, APPELLEE.

REPLY BRIEF.

**Steinfeld Did Not Hold Either the English Group of Mines
or the Three Hundred Shares of Stock as Trustee for
the Company.**

The articles of co-partnership between Zeckendorf and Steinfeld, cited in appellant's brief and made a part of the findings (Finding V) with the several amendments thereto appear in the transcript, pages 433 to 440. The original articles were dated May 26, 1893.

Article I was as follows:

"That the firm name and style shall be as heretofore, L. Zeckendorf and Company, and the principal

place of business at Tucson, Arizona, unless otherwise mutually agreed."

On the 7th of August, 1899, the articles of co-partnership were amended. Article one was amended by adding thereto as follows:

"The business of the said co-partnership shall be the conducting and carrying on of a general merchandise business at Tucson, Arizona. The said co-partnership shall not engage in business at any other place except by mutual consent of the parties hereto as expressed in writing. It is further ——— that the property and assets of the said co-partnership shall be deemed and considered to be only such as at present appears on the books of the said co-partnership, and also such as may hereafter be acquired in the carrying on of said general merchandise business."

The purpose of this amendment was obvious. The Nielson Mining and Smelting Company had been organized in January, 1899, which was at such time indebted to L. Zeckendorf and Company in the sum of about twenty thousand dollars, and this indebtedness was steadily increasing. Zeckendorf was severely criticizing Steinfeld for permitting the co-partnership to venture into these mining speculations. The effect of this amendment was to withdraw from Steinfeld, as the managing co-partner of L. Zeckendorf and Company, authority to invest the funds of the co-partnership in the purchase of mines or mining stocks. The firms' operations were to be restricted to the carrying on of a general merchandise business at Tucson and it was not to operate in business at any other place.

It will be remembered that the mine was closed down in the latter part of January, 1900, and the Francis and Volkert titles were purchased in May, 1900, the Nielsen stock in June, 1900, and the English titles in December, 1900; also

that Zeckendorf had been advised by Steinfeld from the outset, and long prior to the purchase of the English group of mines, that their acquisition was a matter of great importance. There is not one word in any of Zeckendorf's numerous letters suggesting that Steinfeld purchase them with money advanced by the firm. With these conditions before him, Zeckendorf's position was evidenced by the following series of letters to Steinfeld:

October 30, 1899:

"I hope you will not permit this account to increase, it is really strange that we always have some elephant to carry." (Folio 715, page 305.)

December 22, 1899:

"I cannot see how you can get involved in mines to a larger amount than you have security. I am anxious to know how we stand with old Boot. We had a terrible panic here this week and matters are shaky yet." (Exhibit AA, page 304.)

This letter written from New York was received by Steinfeld about the 26th or 27th of December and probably contributed considerably to his conclusion to close down the mine, which he ordered done on the third of January, 1900.

April 25, 1900:

"I was surprised, and no doubt you also, to see the large amount we owe and the enormous amount in the books." (Exhibit CC, page 305.)

May 9, 1900:

"Mr. Hill said when he meets you he will talk to you again about Silver Bell. He has no use for Curtis, he does not speak the truth and the trouble was that you believed him like Jesus. If he had the least ideas about mining, he had a chance to clear us out of the Old Boot in fine shape, but he mismanaged the affairs terribly." (Folio 716, page 305.)

The last two letters must have been received by Steinfeld just at the time he was negotiating with and concluding his contract with Francis and Volkert.

June 2, 1900:

"I hope the Old Boot will turn out satisfactory yet. Such investments to tie up such large amounts of money does not pay us, and I notice you keep us very short in money while we ought to be flush." (Exhibit EE, page 305.)

August 1, 1900:

"Whenever the Old Boot is in good shape to be shown let me know and I will notify my party. I hate to have so much money tied up in so many enterprises, which is actually dead capital." (Exhibit DD, page 305.)

These letters were all written at the time Steinfeld was doing his utmost to acquire the English group of mines and to get rid of Nielsen, who was a disturbing factor and who went on periodical sprees.

Steinfeld wrote to Zeckendorf, August 31, 1899:

"Curtis writes Nielsen goes off on periodical sprees and I am afraid we will have to make a change there if this is not stopped." (Exhibit 23, page 267, folio 640.)

In the light of these letters and the amendment to the articles of co-partnership above quoted in August, 1899, Steinfeld clearly had no authority to invest the money of L. Zeckendorf and Company in the purchase of either mines or mining stock. The only stockholder who complains in this suit is Zeckendorf himself. Surely he is in no position to insist that it was Steinfeld's duty to loan the funds of L. Zeckendorf and Company to the corporation in order that the corporation might speculate in the purchase of additional mines, however tempting such speculation might have been.

Upon Steinfeld's return from Europe, as found by the Court, he notified Zeckendorf that he had purchased the

English group of mines. Zeckendorf knew, as he testified himself, that Steinfeld purchased the Nielsen stock with his **own individual money and thanked him for so doing. He must** have known that Steinfeld also purchased the English group of mines with his individual funds. He made no offer to have the firm or the company take the purchase off Steinfeld's hands, but almost immediately went to Tucson, thoroughly looked into the entire situation, took an arduous trip to examine the mines personally and arranged with Curtis for a weekly report direct to himself.

In January and February, 1901, it appears by the testimony that Mrs. Steinfeld was ill in San Francisco and Steinfeld was there with her. Zeckendorf in the meantime was at Tucson. His testimony shows that he examined the books of the firm and gave the corporation's affairs great attention. He must therefore have ascertained that the firm had not provided the money for these purchases.

On February 7, 1901, Zeckendorf from Tucson wrote Steinfeld at San Francisco:

"As soon as the road gets dry I will go to Silver Bell and see the working of the property." (Page 301, folio 709.)

On February 19, 1901, he again wrote him:

"I have been several days at Silver Bell to acquaint myself with our interests there. I notice a good many improvements since my last visit there and everything looks prosperous. I did not go down into the mines, but through maps have a fair idea how it must appear, which is rather in a doubtful condition. *I feel nervous about our enormous investment and everything depends on the development of the ore body.*" (Exhibit F, page 301.)

The italicized clause (the italics are ours) furnish the key to the situation. Zeckendorf was not yet prepared to have the company take over the mines. Everything depended upon the development of the ore body; if such development should prove unsatisfactory, Zeckendorf would permit

Steinfeld to bear the loss, and he clearly had the legal right so to insist. He therefore neither stated that the company would not assume Steinfeld's purchase nor did he state that it would. His intent was to leave it open and await developments and defer determining whether he would claim that the mines should belong to the company or to the co-partnership, until after their development had established whether they were worth more or less than Steinfeld had paid for them. This is clearly laches under the Twin Lick Oil Company case cited in our main brief. When Zeckendorf left Tucson he arranged with Curtis for frequent reports. He received these as evidenced by Curtis' letters to Zeckendorf appearing at page 299 of the transcript under dates of November 4, 1901; November 10, 1901; November 17, 1901, and November 27, 1901.

As early as June 17, 1901, Zeckendorf writes to Steinfeld:

"I am now receiving a regular report from the Silver Bell which is very convenient for me." (Exhibit FF, page 306.)

On September 3, 1901, he writes Steinfeld:

"I hope you will be able to make a deal, as this is too heavy a load for us to carry." (Exhibit GG, page 306.)

And on December 14, 1901, he writes to Curtis:

"I have received your favor of December 3rd. I have no doubt if you had a more suitable plant the results would be more satisfactory. It seems to me we have to take into consideration the large amount of indebtedness at the present time, due to our firm, which I desire to have reduced instead of increased. (Exhibit HH, page 306.)

It was in December, 1901, the very time that this letter was written, that the price of copper depreciated. (Exhibit 12, page 284.)

Zeckendorf had now waited for a year after he had been informed of Steinfeld's purchase of the English group of mines, and had not offered, either on behalf of himself or the company to assist Steinfeld in the burden of their purchase. Now, when the bottom was dropping out of the copper market he writes commenting for the first time since the acquisition of these mines, upon the large amount of indebtedness due the firm, and stating that he desired the same to be reduced rather than increased.

It seems to us preposterous that he should seriously contend, after the sale of the properties in May, 1903, when all elements of risk had been removed and the property had sold for a large sum of money, that at his instance as a minority stockholder, and at his instance alone, Steinfeld should be adjudged to hold the property as trustee for the corporation.

Proposition July 15, 1901.

The Court has found upon Zeckendorf's direct testimony to such effect, that Zeckendorf had no knowledge of the proposition of July, 1901, until long after May, 1903. It is stated in the proposition that it was made, "In order to bring the matters formally before the stockholders." In the minutes of the directors meeting held on the first of October, 1901, the proposition was in terms referred to as a document prepared by Franklin for the purpose of bringing the question of Steinfeld's action in purchasing the mines and properties before the stockholders of the company. (Page 184, folio 1173.)

Then follows the resolution extending the period of the option from October 15, 1901, until the 15th day of Septem-

ber, 1902, in consideration of the company doing the assessment work for certain years. It was then resolved:

"That the meeting of the stockholders, authorized and directed by the resolution of this Board, heretofore adopted, to be called *by the President* for the purpose of considering the proposition of Mr. Steinfeld under date of July 15, 1901, *be called by him* on a day not later than the 15th day of September, 1902." (Page 484, folio 1175.)

These minutes were in the possession of Lilienthal and Zeckendorf in San Francisco for more than a week before the injunction suit was brought, and of Judge Barnes and Zeckendorf in Tucson for a week prior to the stockholders meeting on the 26th of December, 1903. Whether Zeckendorf had knowledge of this proposition or not, he had full notice of the existence of such a proposition, and as a matter of law was put on inquiry with respect to its contents. He was under the advice of two eminent lawyers, he had then embarked on litigation and the minutes were being scrutinized by him and them for the express purpose of acquiring the fullest information as to the transactions of the corporation. It certainly cannot be argued that the proposition was withheld from Zeckendorf by Steinfeld. Curtis had been active in his efforts to obtain for the company the beneficial ownership of the mines and he was reporting regularly to Zeckendorf. Franklin was co-operating with Curtis. While Steinfeld may have had the power as found by the Court, to dominate the corporation, as a matter of fact in this particular matter he did not dominate it. He was dominated by Franklin, who insisted against Steinfeld's contention that the mines and stock were his own, that he held them subject to the right of the company to acquire them, and in this insistence as against Steinfeld, Franklin and Curtis prevailed. The resolution of the directors was not that Steinfeld should call a meeting of the stockholders, but that Curtis, the President, should call

such meeting. Curtis, who as found by the Court, was not at that time under the dominion of Steinfeld. It is also expressly found by the Court that Franklin was at no time under "the domination or influence of Steinfeld so as to do anything in any of the transactions involved in this litigation, to the advantage of said Steinfeld and against the interests of the said company or the said Zeckendorf." (Finding XI.II, page 511.)

It seems to us, therefore, that Steinfeld at the stockholders' meeting on December 26th, 1903, had the right to assume that Zeckendorf had full and complete knowledge of all the details of the various transactions.

Such assumption is consistent with the finding that Zeckendorf had no knowledge of the proposition until long after May 20th, 1903. The Court expressly refrained from finding that he was without such knowledge at the time of the stockholders' meeting. Furthermore the substance of the proposition was substantially stated in Steinfeld's **two letters** to Zeckendorf of date June 4th and June 30th. (Ex. 105 and 110, pages 289-294.)

It must also be remembered that Steinfeld's control over the corporation consisted, as found by the Court, of his being manager of the firm of L. Zeckendorf and Company, and was due to the indebtedness of the company to L. Zeckendorf and Company, and to the ownership by L. Zeckendorf and Company of the 500 shares of stock and to Steinfeld's control of 330 of the remaining shares. Curtis, who was not under Steinfeld's control, owned 170 shares, which with Zeckendorf and Company's 500, constituted a majority. Therefore, the control of Steinfeld was really the control of L. Zeckendorf and Company, and whatever may be L. Zeckendorf's rights or remedies as against Steinfeld his co-partner Steinfeld's control and Steinfeld's actions were the control and the actions of Zeckendorf and cannot be used to establish any rights in Zeckendorf as a minority stockholder to institute proceedings in behalf of the corporation.

This is particularly true in view of the findings of the court, "that all of the said acts and purposes of said Steinfeld were communicated by him to the said L. Zeckendorf at the time said acts were done or the said purposes formed." (Finding VIII, page 475, folio 1155); and that "L. Zeckendorf and Company had full and complete knowledge through Albert Steinfeld, its managing partner, of all the acts and things heretofore and hereafter found as having been done and performed prior to the 6th day of June, 1903." (Page 470, folio 1144.)

Little Consideration Should be Given to the Finding That at the Time of the Shut-down in February, 1900, the Mines Were Being Worked and Could Have Been Worked at a Substantial Profit.

The finding of the court is,

"That said Mammoth or Old Boot Mine during the Fall of the year 1899 and up to the closing of said mine in the spring of 1900, was being worked at a substantial profit." (Finding VII, page 474, folio 1154.) As a matter of fact, the mine was closed, not in the spring but toward the end of January, 1900. (Steinfeld's letter to Zeckendorf, Exhibit 34, page 273, dated March 25, 1900. "Nielsen's. We are now shut down there over two months.")

On October 31, 1899, Steinfeld wrote Zeckendorf:

"Nielsen smelters have been shut down nearly a month, but expect to start in a few days and run on high-grade ore from bottom of mine." (Exhibit 26, page 268.)

It appears by Steinfeld's letter of November 13, 1899, that the mines were again running, but Steinfeld writes in such letter,

"I believe the property will bring \$150,000, and if you have a buyer send him out to examine same." (Exhibit 27, page 269, folio 643.)

While true that the mine was running at a profit during the fall of 1899, it was also true that it was only being so run during a portion of the last month of the fall, and that in order to make such run during such month it was necessary to suspend the smelter's operations during the month of October and expend money during such month in preparation for the run which was to follow. The expenses of such preparation are not taken into account in the finding of the Court, that the smelter while running, was running at a profit.

It will also be noted that in order to make such profitable run they had to take the high grade ore *at the bottom of the mine*. This is significant in view of the fact that in order to continue to supply the smelter with ore it was necessary for them to continue to sink into new ground where high grade ore might or might not be found. Certainly there was no method of ascertaining whether such high grade ore was there except by the speculation of development work. They could not drift along the vein at the bottom of the mine because they were practically at the end of their claim. On March 25, 1900, Steinfeld writes Zeckendorf,

"Unfortunately the ore body drifted direct into the English Claims, and when we stopped we were within twenty feet of the end line of our claim."
(Exhibit 34, page 273, folio 652.)

It must again be remembered that the finding of the Court is that when the smelter closed down all the ore which had been developed was exhausted, but that "if development work had been continued enough ore would have been developed to have kept the smelter supplied.

We discussed this finding at some length in our main brief. We desire to supplement such discussion by calling attention to the last quoted portion of Steinfeld's letter of March 25, 1900. If they were within twenty feet of the end of their claim they clearly had but little ground

from which they could legally extract ore and therefore could not have operated the smelter for any length of time at a substantial profit, or at all.

Steinfeld and Zeckendorf were both offering the property at one hundred and fifty thousand dollars. (Exhibit 27, page 269, folio 643. Exhibit 28, page 270, folio 646.)

This was so even after getting rid of the Nielsen's and the acquisition of the Francis and Volkert titles, for on July 18, 1900, Steinfeld writes to Zeckendorf:

"My price to them is \$150,000, ten per cent cash and balance in two, four, eight and twelve months." (Exhibit 55, page 280, folio 667.)

The offer to Judge Barnes for \$150,000 cash is mentioned by Steinfeld in the same letter (Exhibit 28, November 28, 1899, page 270), in which he writes:

"They are now clearing about \$500 per day."

This clearly shows that these profits were only during a limited run of a few weeks at a time and could not be made the basis of permanent earnings or values.

The Action at the Stockholders' Meeting on December 26, 1903, Effectuated the Annuling of the Agreement of May 20, 1903.

The concluding portion of Finding XXXII (page 501, folio 1211) is that the plaintiff in voting to rescind the agreement of May 20, 1903,

"did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale. Nor did the directors in good faith understand or believe that the stockholders intended to instruct

them to rescind any portion of the agreement or resolution other than that relating to the indemnity agreement hereinbefore mentioned."

This finding in no way strengthens plaintiff's contention in this case.

This finding is not inartificially drawn; but on the contrary it was drawn with great care to the end that it should express with entire precision and accuracy the exact limitations of the Court's conclusion. What are these limitations and what was the conclusion of the Court? The Court expressly refrains from finding that Zeckendorf did not understand that the action taken by the stockholders would operate to give Steinfeld a claim to a portion of the proceeds; it also expressly refrains from finding that he did not so know or believe. What it does find and what it contents itself with finding is that Zeckendorf did not believe that anybody would as a matter of fact proffer a claim that such action would so operate. The finding is not that no person "could" but that no person "would" so claim. In other words, the finding is that while Zeckendorf knew, or at least should have known, that the actions of the stockholders would operate to give Steinfeld a claim to a share of the proceeds, he did not believe that Steinfeld would actually present or urge such claim. There is no finding even by inference that Zeckendorf did not understand the exact and complete legal effect of the passage of the resolution for which he and all the other stockholders had voted, and there is no finding that any other stockholder did not understand, know or believe what the legal effect of his action would be. Moreover he was acting under the advice of eminent counsel to whom as well as to himself all the facts had been fully disclosed. And Steinfeld and the other stockholders were doing the same, and all the interested parties were admittedly dealing with each other at arm's length. Steinfeld had written Zeckendorf on the 4th of June, 1903,

"Our best showing in values are on the properties" (referring to the English group of mines) "and if you read the Johnson report you will note that he estimates the tonnage of the Old Boot at 50,000 tons, whereas on Southern Beauty and others of these groups 250,000 tons." (Page 290, folio 687.)

Zeckendorf's reply, as quoted in our main brief, was that these mines were nothing but prospect holes, and that they having proved a losing speculation to Steinfeld, Steinfeld now desired to saddle them upon the Silver Bell Copper Company.

With respect to the three hundred shares of stock Zeckendorf believed that they properly belonged to the firm of L. Zeckendorf and Company, and so stated in the office of **Mr. Lilienthal in San Francisco.** (See testimony of Zeckendorf, page 85, folio 201. Judge Barnes representing Zeckendorf, and in his presence at the very end of the stockholders' meeting on December 26, 1903, said, "Mr. Zeckendorf claims and will claim, if the difficulty goes on, that these 300 shares of stock belong to L. Zeckendorf and Co." (p. 500, fol. 1209).)

It is difficult to appreciate just what the Court meant by finding that the "directors did not *in good faith*" understand or believe that the stockholders intended to instruct them to rescind" all of the agreement of May 20, 1903.

This obvious and incontrovertible meaning of the language employed is that the Directors *did* understand and believe that the stockholders intended them to rescind and annul the entire agreement, but that their such understanding and belief are operations of the mind which is not free like the will; and therefore they are not susceptible of either good faith or bad faith. The Directors either understood or did not understand; they either believed or they did not believe. This is not and cannot be a question of good faith. Surely the Court cannot be said to have found that the stockholders did not intend to annul the agreement in its

entirety, or it would have said so in plain and unambiguous language. Such a finding would have been clearly contrary to the evidence.

The intention of a party can only be inferred from what he actually says and does, or leaves unsaid or undone.

The Court cannot find that a party did not intend to do that which he actually did do unless it is alleged and found that the party did not know that he was doing that which he did do. If a party signs a paper without knowing its contents, and the paper purports to rescind a certain contract, it might be held that the party did not intend to rescind that contract. But, if a party signs a paper, well knowing that it contains a clause rescinding a certain contract, it is difficult to imagine how the Court can properly reach the conclusion that the party nevertheless, did not intend to rescind said contract. If the party were induced to sign the paper containing the rescission by means of false representations, or by means of the concealment of a material fact, or by some other fraudulent practice, the Court should find such facts to be true, and it might follow, as a conclusion of law, that the rescission as signed by the party should be set aside for fraud; but a finding upon such evidence that the party did not intend to rescind the contract would not be supported by the evidence, and would be a mere conclusion of law in whatever form it might be stated.

In the case at bar, the evidence shows that prior to the stockholders' meeting of December 26, 1903, to-wit: in San Francisco in the office of Mr. Lilienthal, who was acting as attorney for L. Zeckendorf, it was stated by Mr. Ives to Mr. Lilienthal that after the contract of May 20, 1903, was rescinded, Mr. Steinfeld would claim the right to all the proceeds of the sale of the English group of mines as owner thereof. Mr. Lilienthal treated this statement with scorn and contempt. At that very moment Mr. Lilienthal

for Mr. Zeckendorf, was threatening to bring a stockholders' action to rescind said agreement of May 20, 1903. Prior to that time, to-wit: on June 4, 1903, shortly after the sale of the entire group of mines to the Imperial Copper Company, Albert Steinfeld wrote to L. Zeckendorf, and among other things, said:

** * * The No. 3 group consisting of one and three total 17 claims, were acquired by the Mammoth Copper Company, a company organized and controlled by me, and was for the purpose of acquiring what we always called the English claims. The thirteen claims were jumped by Volkert and Francis, but I never considered their title to same good or to be depended upon to rest with. The Black Daisy, Herbert, Mollit and Anita were, however, valid locations of Volkert, or Volkert and Klug, and were considered of value on account of their locations. At the time these purchases were made by the Mammoth Copper Company, the Nielsens were still owners of their interest in the Nielsen Mining and Smelting Company, and as you know, I subsequently purchased the interest of the Nielsens in the Nielsen M. & S. Co. now known as the Silver Bell Copper Company, as you know we had been trying for a long time to acquire these properties now held by the Mammoth Copper Company and had made many efforts in various directions to secure the same but without avail. It was necessary, however, to procure the original title from the English people, which in a measure I tried to secure by correspondence through various sources but was only able to consummate a transfer of the property when I met the principals in Europe. Without these properties the value of our properties would have been very much reduced. In fact, I don't know if a sale could have been made at all to any syndicate without including same. Our best showing and values are on the properties, and if you will read the Johnson report, you will note that he estimates the

tonnage of the Old Boot at 50,000 tons, whereas on Southern Beauty and other of these groups 250,000 tons. Owing to the Silver Bell Company having no means to avail themselves of this purchase, and owing further to the fact that our firm was already very largely involved with the Silver Bell Copper Company much more than had at any time been contemplated, I undertook to *advance* the money to carry out these purchases personally and offered to turn them over to the Silver Bell Copper Company in writing, whenever I should be reimbursed for the moneys I had expended in acquiring same. The amount of money the company has now paid me and the Mammoth Copper Company is the actual amount which I have disbursed in connection therewith with interest on such disbursements at the rate of 12 per cent per annum. In this is included the \$2,000 I paid Nielsens, and I herewith enclose a condensed statement thereof. I am obliged to pay \$10,000 to the Nielsens when we sell the property, and also to Francis and Volkert on November 1st, 1903, \$12,500, which covers all obligations in connection with this purchase. In no way have I aimed to either charge one dollar more than was actually disbursed in these matters, nor to have personally availed myself of acquiring the benefit thereof. The Silver Bell Copper Company have always claimed ownership of these particular mines under their option of mine to purchase same. I considered them a good purchase at the time and wanted the company to have the benefit thereof, realizing, however, that in all this I was assuming all the risk of holding the properties with no share of any profits in the sale thereof and not even an obligation on the part of the Silver Bell Copper Company to reimburse me, unless they so chose. I consider that the main value of this sale is centered on these mines, and I think every mining engineer will agree with this. Notwithstanding this, I turned them over to the company upon the actual amount of my disbursements plus interest at 12 per cent, and they assume in ad-

dition the payment I am obligated to make to the Nielsens and Francis and Volkert, therefore see how unjust and how unreasonable your insinuations are in inferring that I have aimed in any manner whatsoever to take advantage of either you or the company." * * *

(Ex. 105, p. 289-290, fol. 686).

In reply to this letter L. Zeckendorf on June 18, 1903, wrote to Albert Steinfeld in part as follows:

"You purchased these mines of Volkert and others for your interest and speculation with the expectation to develop another Old Boot, and as these expectations were not realized, the Silver Bell had to reimburse you."

(Ex. 107, p. 293, fol. 692-3).

It should be remembered, however, that L. Zeckendorf visited the mines with Curtis in January, 1901, after the acquisition of the English group by Steinfeld and was shown the properties, and had the situation explained to him fully.

Thereafter, Curtis made reports directly to L. Zeckendorf, giving him full information as to the development work done upon each of the mines, and giving the opinion of Curtis as to the prospective, as well as to the then present value of each of the mines. In other words, L. Zeckendorf had as much knowledge of the value of the English group of mines as Steinfeld himself possessed. Prior to the purchase of the English group, Steinfeld frequently wrote to L. Zeckendorf and explained the necessity for purchasing them to protect the firm of L. Zeckendorf & Co. upon the indebtedness which was owing to it by the Silver Bell Copper Company.

After the meeting in Lilienthal's office, which ended in a bitter disagreement, Steinfeld and Ives returned to Tucson, and Zeckendorf did likewise. Shortly after their arrival

here a copy of the agreement of May 20, 1903, was duly and formally served upon L. Zeckendorf by Steinfeld. On the following day a notice from Steinfeld was formally served upon L. Zeckendorf advising the latter that Steinfeld would faithfully comply with all the terms of the agreement of May 20, 1903, provided L. Zeckendorf would dismiss the stockholders' action to rescind said contract of May 20, 1903, upon the ground that it was obtained by fraud. Such suit had been commenced in San Francisco by L. Zeckendorf about the time Steinfeld started back to Tucson.

One or two days later notice was served upon L. Zeckendorf that a stockholders' meeting would be held in Tucson on December 26, 1903.

L. Zeckendorf, accompanied by his attorney, the late Hon. W. H. Barnes, attended that stockholders' meeting. The 500 shares of stock belonging to L. Zeckendorf & Co. had been equally divided between L. Zeckendorf and Albert Steinfeld early in the month of June, 1903, and so stood upon the books of the corporation.

Let us stop for one moment to look backwards. During the controversy in San Francisco Albert Steinfeld was accompanied and represented by an attorney, Mr. Ives. L. Zeckendorf was constantly represented by an attorney, Mr. Lilienthal. Suit was brought by Zeckendorf attaching the money and notes, which were in the Bank of California, and the rightful possession was vested in Albert Steinfeld by the agreement of May 20, 1903. A compromise was discussed. It was admitted by Lilienthal that the garnishment suit was brought solely for the purpose of gaining time to prepare a complaint in a stockholders' equity action to enjoin the bank from delivering the money and notes to Steinfeld. As the contract of May 20, 1903, gave Steinfeld the absolute right to the custody of the money and notes, it is obvious that an injunction cannot be secured in

a stockholders' action unless it was alleged in the complaint that the contract was obtained by fraud or was unfair, and unless a rescission thereof was sought.

Before Zeckendorf and Steinfeld returned from San Francisco a stockholders' action to rescind the contract was instituted by Zeckendorf.

What could have been the intention of Steinfeld in serving L. Zeckendorf with a copy of the contract of May 20, and with a formal notice that he was ready and willing to faithfully comply with its terms, provided the stockholders' action in San Francisco was dismissed?

The attorneys for L. Zeckendorf could only have understood these actions on the part of Steinfeld to mean that he intended to do what Mr. Ives told Mr. Lilienthal they would do if Zeckendorf persisted in bringing his stockholders' action to rescind the contract.

No other construction upon these acts was possible. Before Steinfeld could consent to a rescission of the contract at the instance of a stockholder of the corporation, it was necessary for him to put that stockholder in possession of all the material facts. If the stockholder voted to rescind without knowledge as to any material fact, the rescission could afterwards be voided. Hence, it was necessary to serve L. Zeckendorf with a copy of the contract of May 20, 1903. While in San Francisco the minute book of the corporation had been surrendered to Mr. Lilienthal and had been in his possession for several days. After the return to Tucson the minute book, as well as the other books of the corporation, were exposed to the examination of L. Zeckendorf and his attorney, Judge Barnes, whenever they desired to see the same and all the books were thoroughly examined by both of them between the time that the copy of the contract of May 20th was served upon L. Zeckendorf and the time that the stockholders' meeting was held on December 26, 1903.

At the stockholders' meeting Judge Barnes, as attorney

for L. Zeckendorf, insisted upon attaching a copy of the agreement of May 29, 1903, to the resolution annulling and rescinding said agreement, and not one word was said by him or any other person present about excepting any part of the said agreement or any provision therein from the resolution of rescission. That Steinfeld and his counsel intended to rescind the entire agreement and particularly that part of it which relates to the ownership of the proceeds of the sale of the English group of mines, cannot be doubted by any sane person. That L. Zeckendorf intended to rescind the entire agreement including the part of it last referred to, cannot be doubted in the face of what was actually done.

He cannot escape from the consequences of his deliberate, voluntary act in voting to rescind said agreement unless he was induced to so vote by reason of some false representation of a material fact, or by reason of some concealment of a material fact, or by reason of some other fraudulent practice on the part of Steinfeld or his attorney.

Since it is not alleged in the amended complaint upon which this case was tried that L. Zeckendorf voted for said rescission without knowing the contents of the contract and since it is proven that he had the contract in his possession for about one week prior to the stockholders' meeting, and was being advised in regard to his rights thereunder by an attorney learned in the law, and since there is no allegation in said amended complaint of any misrepresentation, concealment, want of knowledge or other facts constituting fraud, which would authorize the trial court to set aside said rescission, and since there is no finding by the trial court of any such facts, it seems to follow, as night follows day, that he must have intended to rescind the agreement in its entirety and that he must now abide the consequences of such rescission whatever they may be.

It is urged in the brief of appellant that the board of directors had no right to pass the resolution which was

adopted on December 26, 1903, immediately after the stockholders' meeting. It must be remembered that the amended complaint does not contain any allegation in regard to this action of the board of directors except the single one that this action on the part of the board of directors "was not consented to by this plaintiff, and this plaintiff has not consented to or ratified the same."

As before pointed out this seems to be a conclusion of law on the part of the pleader. L. Zeckendorf certainly did consent to such action on the part of the board of directors when he voted as he did at the stockholders' meeting on the same day unless it can be shown that he did not know what he was doing when he so voted at the stockholders' meeting, and no attempt has been made to either allege or prove such a fact. If any other facts exist which would authorize the Court to ignore the consent to the rescission of the contract of May 20th, which L. Zeckendorf gave by his vote at the stockholders' meeting on December 26th, 1903, such facts should have been alleged and proven. They have neither been alleged nor proven and the trial Court has failed to find their existence.

The contract of May 20, 1903, was one between a director and his corporation. Consequently it was voidable upon slight grounds at the instance of any stockholder who was not estopped by his prior action from objecting to it.

"A contract between a director and the corporation is voidable and not void."

Cook on Corp. Vol. 2 (4th Ed.) Sec. 615.

The Courts seem to hold unanimously that a contract between a director and his corporation may be rescinded by the action of the stockholders in repudiating same, and that when so rescinded, it becomes so *ab initio*, and the stockholders only have the power of electing whether they will

ratify and affirm or repudiate, reject and rescind such contracts. The action of the stockholders on December 26, 1903, in rescinding the agreement of May 20, 1903, is absolutely conclusive as between the parties and voids the contract *ab initio*. Every share of stock voted to rescind the contract, and it cannot be doubted that this rescission was effective without any further action by the board of directors.

The Possession of the English Group of Mines by the Silver Bell Copper Company Means Nothing.

The Supreme Court made certain findings in addition to those made by the Judge of the District Court. They appear at page 512 of the transcript. Among them is the following:

"The Silver Bell Copper Company went into possession of the English group of mines after its purchase by Steinfeld, and, was given by Steinfeld the right of working the same and treating any ores that might be taken from the same in the company's smelter." (Folio 1233.)

Curtis testified with some elaboration to the same effect, and also that the ores taken from the mines purchased by Steinfeld and used by the company under this authority were many times more valuable than the cost of extracting the same and the development work upon such mines.

The record discloses not one word of evidence to the contrary. The Company was benefited by this possession and therefore it cannot be urged as an element of estoppel against Steinfeld.

Appellant's Statement of Facts.

Counsel for appellant do not appear to have been entirely candid in supplementing the opinion of the Supreme Court by italicized quotations from the findings of the District Court.

On page ten they assert in italics that Steinfeld was in complete control of the corporation, but neglected to add, as found by the Court, "that the power of Albert Steinfeld over the Silver Bell Copper Company and over the directors and officers thereof up to the month of June, 1903, arose out of the following facts and conditions, viz: The fact that said company was heavily indebted to L. Zeckendorf and company, and that L. Zeckendorf and Company and William and Julia Zeckendorf held a majority of the stock of said company, said Albert Steinfeld as the managing partner of said L. Zeckendorf and Company having the power to control said indebtedness and to vote said stock. * * *"
(Page 471, folio 1146.)

The above omitted portion of the finding being as has been heretofore argued, in effect that the control of Steinfeld was the control of L. Zeckendorf and Company, and that, therefore, L. Zeckendorf, whatever may be his rights as against Steinfeld, his co-partner, has none in the premises as stockholder of the Silver Bell Copper Company.

At page 19 of appellant's brief the language of the Supreme Court that it was resolved at the meeting held on October 1st, 1901, that a stockholders' meetings should be called to act on Steinfeld's proposition is left unchallenged, although the Supreme Court chanced to omit the statement that the resolution was that the stockholders' meetings should be called *by the President*. These words the learned counsel in their effort for accuracy did not deem it necessary to interpolate. They are conclusive, however, as has been argued, that the failure to call the stockholders' meeting was not due to Steinfeld's domination of the corporation, but to the act of Curtis, the President of the corporation, who was admittedly at such time contending for the ownership of the English group of mines by the corporation.

On page 25 of their brief, counsel for appellant insert

in italics a portion of Finding XXIV, to the effect that the cash and four notes were delivered to Steinfeld as Treasurer of the corporation, but they omit the next and concluding sentence of such finding, which is as follows:

"And said cash and notes were to be held by said Steinfeld pursuant to the agreement of May 20, 1903, in the next finding set forth." (Page 488, folio 1182.)

On page 27 of their brief counsel state that the object sought in Zeckendorf's San Francisco suit was the rescission of certain resolutions of the board of directors. They neglect to state that the prayer of the complaint in response to direct allegations was that the *agreement* of May 20, 1903, should be annulled and rescinded.

The statements in counsel's brief at pages 56 to 59 to the effect that Steinfeld's effort was to keep the beneficial ownership of the properties away from the corporation in order to deprive Nielsen of any participation in the same is pure conjecture, and is contrary to Finding XIII, that Steinfeld in purchasing such group of mines from Francis and Volkert (this was before the purchase of Nielsen's stock) purchased them with the purpose to offer to the Silver Bell Copper Company the opportunity to take them off his hands at cost. (Finding XIII, page 477, folio 1160.)

The statement upon the last half of page 68 of counsel's brief is to the same effect, is utterly unfounded in fact, and is contrary to such Finding XIII.

The suggestion on page 65 of appellant's brief that Steinfeld led the other stockholders of the corporation to believe that he was acting for the corporation in acquiring the English group of mines is contraverted by Finding XIX (pages 485-6).

The last paragraph of such Finding is as follows:

"That Albert Steinfeld did not at any time prior to the purchase from the English owners of their

title to the English group of mines make any direct or express promise or representation to the * * * company or to any officer or director of said company that he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines, or the title of the English owners of the English group of mines for the use or benefit of said company."

Moreover there is no allegation or finding or evidence that any officer or stockholder of the company was misled or influenced by any such alleged representation or conduct of Steinfeld, or that the company failed to acquire the same for its own benefit by reason thereof.

The case of *Ayerill against Barber*, 6 N. Y. Supp., 255, is cited by counsel for appellant. In the portion of the opinion in such case quoted in counsel's brief it is stated:

"The defendants upon acquiring them (the patents in question) should have tendered them to the company and transferred them on being repaid what they cost." (Appellant's brief, page 73.)

Steinfeld did tender the English group of mines to the company, and we respectfully submit that the company having neglected to avail itself of such tender within a reasonable time, which was that prescribed in the option, lost all equitable interest in the same, if it ever had any.

It is stated at page 133 of counsel's brief that the Arizona Supreme Court found:

"But in making and in presenting the said proposition the said Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duties to the said company."

This was the finding of the District Court and adopted generally by the Supreme Court. The Supreme Court,

however, specifically found the reverse in the following language:

"Acting under this advice (advice of Franklin) on July 15, 1901, Steinfeld handed to Shelton, Secretary of the company, the proposition of date of July 15, 1901, heretofore found." (Page 512, folio 1233.)

This specific finding by the Supreme Court, as argued in our main brief, undoubtedly controls the more general one.

At page 142 of their brief counsel for appellant state that in making the proposition of July 15, 1901, Steinfeld

"unquestionably intended that no third party should profit by the ownership of the adjacent or English mines and the fiction of an option was adopted for the purpose of excluding Nielsen as a third party."

Counsel evidently had forgotten that the Nielsen stock had been purchased by Steinfeld in June, 1900, or more than a year before the proposition of July 15, 1901, was made.

Counsel for appellant dwelt upon the fact that in the resolution adopted at the stockholders' meeting of December 26, 1903, the language was that the said agreement and *resolution* passed on said day be declared null and void. They argue that the use of the singular—resolution—precludes the notion that the resolutions passed on that day were declared null and void. We do not deem this very important in view of the fact that, as heretofore argued, the annulling of the agreement reestablished in Steinfeld the title to his proportionate part of the proceeds of the sale, but, if disposed to be as technical as counsel for appellant, we respectfully submit that the word "resolution" covers all of a matter submitted to one vote of a board of directors. If first one resolution is submitted and

voted upon and then another is submitted and voted upon separately such action constitutes the passage of two resolutions, but if a single matter is submitted to a board and adopted by one vote, it is one resolution, even though a great many matters may be successively stated therein.

Conclusion.

It is impossible to conceive that Steinfeld at any time committed any act upon which an implied trust may be formulated. If one purchases for himself property when he knows it to be his duty to purchase it for the benefit of another toward whom he holds a fiduciary relationship, he is guilty of actual fraud and holds the property as constructive trustee. If one purchases for himself property which it is his duty to purchase for another toward whom he holds such fiduciary relationship, but does so without knowledge that such is his duty, then he is guilty, not of actual, but of constructive fraud, and though morally innocent, he nevertheless holds the property as constructive trustee for such other person. But in order that there may be a constructive trusteeship, it is necessary that there be either actual or implied fraud, and an essential element of such fraud is his purpose and design to procure the property for his own benefit and to hold it as his own and not to permit such other person to have any interest in it. Finding XIII negatives any notion of either actual or implied fraud on the part of Steinfeld in the purchase of the English group of mines. His whole conduct is conclusive to the same effect. When Franklin told him that he held the properties as trustee, he immediately acquiesced. After he had made the advantageous sale of the properties he made no effort whatever to retain their beneficial ownership for his own use. At no time did he conceal anything whatever from either Zeckendorf or the other stockholders of the corporation. Even after Zeckendorf's unwarranted

attack upon him and impairing of his credit by the action brought in San Francisco and his notice to the San Francisco bank, Steinfeld was ready and willing to permit the corporation to retain the proceeds of the sale.

The language contained at page 121 of appellant's brief that—

"Steinfeld, by his action at the time of the purchase of the English group of mines and the Nielsen shares of stock, lulled the Silver Bell Company into the belief that he was purchasing the property for it and that he affirmatively and intentionally continued this belief of the Silver Bell Copper Company that it owned these properties,"

is unfounded and grossly unfair and unjust, and directly in conflict with Finding XIII.

In his proposition of July 15, 1901, he stated:

"I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth by the Mammoth Mining Company and by myself, are of great value to you (the Silver Bell Copper Company), and that your company should own the same." (Page 181, folio 1168-9.)

This language is conclusive as to his fairness and the liberality of his intentions. Whatever may be said of the proceedings commencing with December 26, 1903, no just person can deny that Steinfeld's actions up to that date were unselfish and more than just to the company.

On the 30th of June, 1903, he wrote Zeckendorf as follows:

"When the original Old Boot was first leased to Nielsen, we believed the property would take care of itself and the advances made him were based on ore values and smelter product which was not realized. When we subsequently organized the Nielsen M. & S. Company it was to protect these advances. No one will or can ever know the worry and anxiety

I went through in the various stages of this operation, and it is needless to refer to same except to say that it was never contemplated that we should ever get involved to such an extent as we did. I involved my personal money and undertook and assumed obligations which this company had the option to take up and repay me my disbursements. While I at all times recognized the value of these properties, either by themselves or otherwise, I never aimed at any time to personally avail myself of same. I assumed all the risk and the company got all the profits. The same applies to the purchase of the Nielsen stock and interest. I used my personal money in its purchase and personally assumed the obligation of its first payment * * * I do not think you will doubt for a moment that I could have purchased and secured all this without considering this company. * * * I assumed, however, to have this company avail themselves of my personal efforts and personal investments and obligations I have assumed without any profits to me." (Page 294, folio 694-5.)

When the stockholders met at Tucson on the 26th day of December, 1903, Zeckendorf had full knowledge. Steinfeld, on June 1, had written him the value of the English group of mines. Zeckendorf, moreover, had personal knowledge of their values from his inspection of the mines themselves. Both were represented by counsel. They were dealing with each other at arm's length. Zeckendorf's unreasonable and unjust aspersion of Steinfeld's honesty and business integrity, and his offensive conduct to Steinfeld himself in their office at Tucson had made them personally hostile to each other. Steinfeld was now advised by his counsel that he had never been trustee, that Franklin had been wrong, and he believed that if the agreement of May 20, 1903, was annulled he would become reinvested with a proportionate part of the proceeds of the sale; in his judgment this amounted to more than half of the total proceeds.

So Steinfeld was willing to annul. Curtis and Shelton had no election in the matter Zeckendorf had unjustly accused them under oath in his injunction suit of fraud and robbery. Furthermore they all appreciated that the contract of May 20, 1903, made by Steinfeld with himself was voidable and that Zeckendorf had the right to have it annulled. A suit to annul it was pending and there was no defense to such suit. Zeckendorf wanted it annulled. He may have believed that Steinfeld was trustee and that, therefore, the annulling of the contract would not vest in Steinfeld any title to the share of the proceeds for the reason that Steinfeld never had been entitled to them, and, therefore, had not relinquished any right to the same by the contract which was to be annulled. This was the advice of Franklin, and is the opinion of the present eminent counsel of Mr. Zeckendorf. In any event, Zeckendorf knew what he was doing. Lillenthal, by treating with contemptuous indifference Ives' statement of what Steinfeld would claim in the event that the agreements should be annulled, had undoubtedly impressed Zeckendorf with the notion that the beneficial ownership of the property had always been vested in the corporation. Steinfeld believed that by the annulling of the contract he would reacquire the three hundred shares of stock. Zeckendorf believed that by annulling it such three hundred shares of stock would belong to the firm of L. Zeckendorf and Company, as both Lillenthal and himself had therefore claimed, and as Barnes was even then claiming, in which event Zeckendorf would have owned a larger share than he would receive by his participation in it as property of the corporation.

Even after the resolution annulling the agreement had been adopted, if Zeckendorf had dismissed the two actions then pending in San Francisco, Steinfeld would have been willing to continue his policy of liberality toward the corporation and by reason of past affiliations to forget and

forgive the injustice which had been done him; but when Zeckendorf had been met with a concession by Steinfeld, on every point and still refused to dismiss these suits, Steinfeld felt that it was time for him to rest upon his rights, and since then he has done so.

The English group of mines, as appears by Johnson's report, which is in evidence, had four times the tonnage of the Old Boot. Steinfeld could have readily proven, if called upon by an appropriate allegation in the complaint, the full justice of the distribution of the proceeds of sale which was made on January 16, 1904. This fact was doubtless appreciated by counsel for appellant when, as referred to in the opinion of the Supreme Court of Arizona, by stipulation they withdrew the evidence which had been adduced bearing upon the respective values of the two groups of mines and admitted that there was no allegation in the complaint to which such evidence could be deemed responsive.

It is respectfully submitted that the judgment in favor of the defendants upon the first clause of action should be affirmed and that the judgment upon the second cause of action should be reversed and the case remanded with directions to order judgment absolute for the defendants upon both causes of action.

Dated Washington, D. C., March 13th, 1912.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attys. for Appellees.

Office Supreme Court, U. S.
FILED.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 139.

LOUIS ZECKENDORF, PLAINTIFF-APPELLANT,

vs.

ALBERT STEINFELD ET AL., DEFENDANTS-
RESPONDENTS.

**REPLY AND SUPPLEMENTAL BRIEF OF
PLAINTIFF-APPELLANT.**

FRANK H. HEREFORD,
EDWIN A. MESERVE,

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and Plaintiff-Respondent.*



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The court will bear in mind that when this case was before the Supreme Court of Arizona, on the first appeal thereto (88 Pac., 7), it reversed the decision of the lower court, holding as a matter of law that the actions of the stockholders at their meeting held December 26, 1903 (minutes set out *in hac verba* in Finding XXXII, commencing at page 493 of the transcript), amounted to a rescission of the transactions of May 20, 1903, under which the court as a

proposition of law further held that the Silver Bell Copper Company became the owner of all the proceeds of the sale to the Imperial Copper Company. This decision became the "law of the case," so far as the lower court and the Supreme Court of the Territory were concerned. But recognizing that this decision of law was in no manner binding on this court, the territorial, district, and supreme courts incorporated in their findings the entire stenographic report of what occurred at this meeting, together with an additional finding, from all the evidence, that neither the plaintiff nor any other stockholder (including the individual appellees) intended to rescind the main transactions of May 20, 1903 (Findings, Tr., folio 1211, page 501). The Supreme Court of the Territory having rendered its decision on the facts as found by the lower court, adopted as its findings of the facts, in the nature of a special verdict, for use on this appeal, all the findings of the district court.

The decision on the first appeal, settling, as the law of the case, until this court in regular order could be reached, that these proceedings did rescind the transactions (plural) of May 20, 1903, the lower court was bound to decide the case in favor of the defendants, particularly as the Territorial Supreme Court in that first decision had also held, as a proposition of law, that the transaction of January 16, 1904, set out in Finding XXXV (folios 1222 *et seq.*, pages 507 *et seq.*) was not void, nor even voidable, unless absolute unfairness was directly proven and shown. We have argued (and we fully believe that the story chronologically and consecutively told by the findings permits of no other argument) that the Silver Bell Copper Company in law, but surely in equity, became and was the owner of all of the proceeds of the sale to the Imperial Copper Company, without regard to what took place at the directors' meeting of May 20, 1903.

We have directed this honorable court's attention to how Steinfeld acquired the English group of mines for a mere

trifle as compared with the then and subsequent value of the Old Boot Mine. The findings tell how Steinfeld, as the power in control of the Silver Bell Copper Company (then the Neilsen Mining and Smelting Company) ascertained that the *mine* of the Silver Bell Copper Company, would soon run into those English mines; how he acquired these mines at a great expense and loss to the company; how he recognized the fact that he had bought them for the company by turning them over to the company in 1900, long before the July 15, 1901, "proposition" was "made;" how with his full knowledge and consent and under his orders and directions, the company held, worked and developed those properties as *its own*; how afterwards, when he began to show a disposition to personally appropriate these properties he acknowledged that the company should own them, and that he held them in trust; how the so-called July 15, 1901, "option" was never acted upon, because Steinfeld was at all times in complete control and dominion of the company; how he caused the company to believe it owned all those properties; how *he* priced them all as one property at one price without any action of the board of directors; how he, on May 13, 1903, a week before May 20, 1903, had his acts in so doing ratified by the board, without a suggestion that he claimed or would claim any part of the entire purchase price, knowing that the company and all its officers, then considered that it owned all those properties; how before the meeting of May 20, 1903, he caused the entire deal to be concluded and the money to be paid to him as treasurer of the Silver Bell Copper Company, and the notes for \$400,000, payable to the order of the Silver Bell Copper Company, to be turned over to him as such treasurer.

This court will observe when reading the minutes of the stockholders' meeting of December 26, 1903, that all parties at that meeting were careful to confine the proceedings to the so-called guaranty agreement of May 20, 1903 (set out

in Finding XXV, Tr., page 488), and the *resolution* (singular) authorizing it.

The Territorial Supreme Court set forth in full, in its findings of fact for use by this court the entire record of the meeting of May 20, 1903 (Finding XXV, Tr., pages 488 and 489), that this court might have before it all the resolutions of that day in order that it could say, as a matter of law, what effect the proceedings of December 26, 1903 (Findings XXXII and XXXIII) had on the ownership of the money and notes on that day in the hands of the company, and therefore what pretense of an excuse there was for the transactions of January 16, 1904 (Findings XXXV and XXXVI), as illuminated by Findings II and III and XL. And in view of the position of the Territorial Supreme Court with reference to this question, as a question of law, we feel justified in here quoting at length the resolutions (plural) adopted that day, and asking appellees to tell us and this honorable court if they contend that on December 26, 1903, they too were rescinded.

The minutes of the directors' meeting of May 20, 1903, will be found in Finding XXVII (Tr., pages 489 *et seq.*).

Mr. Steinfeld first caused the president to "report" what had been done. We say advisedly that Mr. Steinfeld *caused* Curtis to report, for the court finds that at all the times mentioned, Steinfeld was in complete control of the company and that Steinfeld did, or caused to be done, everything that was done in connection with the sale to the Imperial Copper Company. In this "report" Curtis, the president, is recorded as setting forth the facts that the properties *had been* sold, that the papers were all signed and delivered, and that Steinfeld, the *treasurer* of the company, and as such had in his possession the \$115,000 in money, and the four promissory notes to the order of the company, each for \$100,000.

The court will bear in mind that then, as ever since before the end of 1900, Steinfeld and Shelton (Steinfeld's

dummy) were two out of the three directors of the company. In using the word "dummy" here and elsewhere in this brief, we do not do so in an offensive but only in a representative sense. The minutes then proceed to record (Tr., page 491) that "after a full consideration, the following resolutions were unanimously adopted, to wit:—"

The first resolution ratifies and affirms all the acts of the officers in making the sale to the Imperial Copper Company.

Did the stockholders on December 26, 1903, either "re-scind" this resolution or authorize the directors to do so? Manifestly, no.

The second resolution "accepted" Steinfeld's "proposition" of July 15, 1901, with his so-called "modifications," and directed the treasurer (Steinfeld) to pay Steinfeld \$18,117 (which included interest at 1% *per month* on every dollar he had been out, even for the trip of himself and son to Europe), and to pay the parties to whom Steinfeld *and the company* were *obligated*, a sale of the Mammoth or Old Boot Mine having been made.

Did the stockholders on December 26, 1903, take any action with reference to this resolution? Manifestly, no.

But to digress, we ask what right had Steinfeld *then* to impose any "conditions" or "modifications?" He had already caused all the company's properties to be sold. The price which *he* fixed was an *entire* price of \$515,000. The company at that time believed that it owned all of the properties sold. There was no suggestion of a division of the proceeds of the sale or of any money going to Steinfeld other than the \$18,117. On May 13, previous, Steinfeld caused the directors to ratify his written option of April 3, under which the sale was made, and under which, *because of that board action, it had to be made*. The company acting under the orders of Steinfeld, had treated his July 15, 1901, "option" as still in force; as in fact and in law under the very arrangement made it must have been, for no action had been taken to repudiate Steinfeld's previous actions, or

to relieve him from the trust which was imposed on him, and which by all understanding was to remain until disaffirmed; and on his orders and under his control the company had continuously worked the so-called English group of mines as its own, as and being its own properties. A large part of the indebtedness owing to Zeckendorf and Co. by the Silver Bell Copper Company was on account of the opening up and development of these English mines. This indebtedness, amounting to \$115,000, as shown by Steinfeld's account (Findings, Tr., page 501), was paid by Steinfeld as treasurer of the company, but subsequently when Steinfeld and his two "dummies" voted to Steinfeld one-half of the company's notes and money, Steinfeld forgot (?) to charge himself or to credit the company with any part of the money, represented by that indebtedness, that had been expended by the company in developing that English group of mines from mere "holes in the ground" to more or less attractive mines.

The next resolution authorized the payment of the commissions which Steinfeld had contracted to pay, and which, as shown by his account, he did pay. Was that resolution affected by any action of the stockholders on December 26, 1903? The next resolution authorized the giving of indemnity and the execution of certain papers, if called upon so to do.

The next and last resolution is *the one* referred to in the minutes of the stockholders' and of the directors' meetings of December 26, 1903, and the one that Mr. Zeckendorf, in the San Francisco law suit, complained of and sought to have set aside. This resolution specifically refers to the agreement *that day entered into*, viz., the May 20, 1903, guaranty agreement, set out in full in Finding XXV (Tr., pages 488, 489). This agreement, and this resolution, and none other, were rescinded on December 26, 1903. This resolution and this agreement and Steinfeld's actions under them were the only things Mr. Zeckendorf, in his San Fran-

cisco suit, complained of, and when they were set aside, as Mr. Ives himself at the meeting remarked, the prayer of the complaint had been met and the money and notes of the company had been turned over by Steinfeld to the company.

We again repeat that the company, under this resolution and this agreement, *acquired* absolutely nothing, and that nothing was done, or attempted to be done thereunder, except to give to Albert Steinfeld the exclusive personal possession and control of the company's money and property, for an apparently indefinite period of time, and it was of just that which Mr. Zeckendorf was complaining in November and December, 1903, up to the action on December 26 resulting in Steinfeld turning over to Curtis, and the latter depositing in the name of the company, all this money and these notes.

We have again dwelt at length on this branch of the case, because of the decision of the Supreme Court of the Territory on the first appeal, and which, as we have before stated, controlled the subsequent proceedings in the territorial courts.

In the presentation of the case on behalf of the plaintiff-appellant we have stuck religiously to the findings of facts as made by the district court, and adopted and approved by the Supreme Court of the Territory, in our statement of the case *italicising and putting in brackets certain facts which we deemed of the utmost importance but which the territorial Supreme Court evidently did not, as evidenced by its statement and its opinion.* In some instances, it will be noted that we in this same manner call attention to the changes in the language of the findings to that used in the opinion.

As we understand the statute governing appeals in equity cases from the territorial court to this court and the rules and practices of this honorable court, the facts found by the territorial Supreme Court, in the nature of a special verdict, after it has rendered its decision, and

when it knows the case is to come up to this court, are the facts, and the only facts, which this court will consider.

Our adversaries evidently do not so regard the rules and the law. They state (Brief, page 37) that their statement is made up, partly from the statement of the case in the first territorial decision, partly from the statement in the second, and partly from what they call undisputed evidence, that not only was disputed, but is largely contrary to the findings. Furthermore, we challenge a comparison of their "statement of the case" with the findings of facts. There may be some features that show a "family resemblance", but on better acquaintance we find even they are not observable. When counsel come to their argument, they rely almost wholly on the evidence which they refer to and select, and which again we say is contrary to the findings. When this court comes to consider the brief on behalf of defendants-appellees, it will have a tremendous task, if it undertakes to determine what are findings, what evidence and what mere conclusions or inferences from one or the other of the opinions referred to. We found upon trial that we could not do it in the time intervening between the receiving of counsel's brief and now.

We are, however, *almost* prepared to assert, that counsel for defendants-appellees have not made an argument, or argued a single question relying upon the findings for the assumed facts, on which the argument is based.

As neither side has argued or presented any question involving the admissibility of evidence, the record before this court consists of the pleadings and the findings; and as neither side has claimed that the findings are not upon the issues made by the pleadings, for all practical purposes, the entire record on this appeal, is contained in the findings, commencing on page 468 of the transcript. It is rare that so complete a story of a case is so logically told, as is the case in the findings here, and for that reason, we feel that when at some stage of the consideration of this case, by the honorable justices of this court, they uninterruptedly and

without break or digression, read the findings from beginning to end, they will say, with us, that other argument in support of plaintiff-appellant's contention that the Silver Bell Copper Company was outraged on January 16, 1904, was not necessary.

Throughout the history of this case, counsel for plaintiff-appellant have refrained from using terms with reference to that transaction, that properly and legally might have been borrowed from the statutes of both God and man.

We have often wondered what could have caused or permitted men to do such a thing; and we have come to the conclusion that it was because of a lack of appreciation of the powers of man-made laws and equity maxims and rules, and the great distance in time and space between Mount Sinai and Tucson.

Most of the points argued by counsel for appellees are covered by our brief now on file, but we would like to refer here in a general way to some of the arguments made in appellee's brief.

On page 21 of his brief, counsel comments on the fact that the Territorial Supreme Court found that Steinfeld did not prevent the company from purchasing the English group of mines by any "*representation*" to the officers or board of directors of the company, that he intended to or would obtain the property for the company. It is true that there was no such direct *representation*, but every act of his, as shown by the findings, gave the officers and stockholders the right to infer, and Curtis, the president, did infer that Steinfeld intended to and was buying these properties for the company. At that time, Curtis, the president, was the only officer or director outside of Steinfeld, Shelton then, as always, being Steinfeld's "dummy."

In the arguments presented with reference to Steinfeld's having guaranteed the titles, counsel forgets to mention the fact that before the directors' meeting of May 20, 1903, on Mr. Gage's instance, not only had Steinfeld guaranteed

the title to all the mines, but Steinfeld, on Gage's insistence, had made and caused the Silver Bell Copper Company to itself guarantee all the titles, including the titles to the only properties whose titles could possibly be questioned, viz: the titles to the English group of mines.

It was to protect Steinfeld for having, before the meeting of May 20, 1903, jointly with the company, guaranteed the title to *these properties of the company*, that Steinfeld caused the guaranty agreement of May 20, 1903, to be authorized and executed, and not for the purpose of conveying or transferring any title or properties, moneys or notes, to the company.

Frequently counsel refers to "undisputed testimony," "uncontradicted evidence," etc., where he must know that the record of the evidence, if it is to be considered by this court, does not at all sustain such statements.

On page 35 of his brief counsel sets forth the main portion of a stipulation, which as we understand it is a part of the record to be considered on this appeal.

This honorable court's attention is directed to the wording of this stipulation. It will be observed that it withdraws the evidence of *relative values*, as *justifying* the action of Steinfeld, and his dummies, Shelton and Curtis, in "*apportioning*" or "*giving*" to Albert Steinfeld one-half or any part of the proceeds of the sale to the Imperial Copper Company. Who does this honorable court think was endeavoring to prove these *relative values*, in order to "*justify*" the actions of Steinfeld and the men who the court found were then under his complete dominion and control, doing as he directed and not otherwise, and whose actions were known only by him and them, and his counsel? Would counsel suggest by setting out this stipulation, that we were trying to *justify* the actions, which we were condemning, as being in the extreme fraudulent and wrongful?

Counsel all through this brief refers to resolutions "*adopted*" by Steinfeld, Shelton and Curtis, which were in

Steinfeld's favor and which we are here attacking, as being actions of this board of directors, binding on the company. On page 45 of his brief counsel, under heading "I", argues that Steinfeld was not a constructive trustee subsequent to September 15, 1902. This was the date to which the so-called July 15, 1901, "option" was extended by Steinfeld and his board of directors, notwithstanding which fact, this date was not referred to in the resolutions of May 20, 1903.

Steinfeld, under the arrangement between him on the one side, and Curtis the president and Franklin the attorney of the company on the other, was to continue to hold all those properties in trust for the company, unless and until the company's stockholders, at a meeting where L. Zeckendorf voted the Zeckendorf & Co.'s stock, had repudiated Steinfeld's purchase and his charging the company with the price. The power to cause that meeting to be held was in Steinfeld alone. It was never held; but the company went right on after September 15, 1902, as it had before July 15, 1901, doing all the assessment work on these mines, developing them and using them as and being its own property, all with the knowledge and consent, and of necessity, under the orders and direction of Steinfeld, who then, as always, controlled the company, and had full knowledge of its affairs.

The court in this connection will bear in mind the findings, and the arguments based thereon in our brief on file, as to the manner of Steinfeld's acquiring these properties, and the great loss and damage he caused the company in order that they might be acquired at as little cost and trouble as possible.

We maintain that until Steinfeld's actions were repudiated by an independently acting corporate body, he continued to be a constructive trustee;—in fact after his letters to Curtis written in May, 1901, referred to by counsel, and his reports and letters concerning the "properties of the Silver Bell Copper Company", and the signing of the July 15,

1901, document, he was and ever afterwards continued to be an express trustee, holding the title to those properties in trust for the company and as security to himself that he would be reimbursed.

Under heading "A," page 56 of his brief, counsel argues that Steinfeld's relations to the Silver Bell Copper Company were not, under the circumstances, such as to impose upon him the duty of purchasing these mines for that company.

We submit that counsel's own argument is its own best answer.

The findings fully and clearly show what Steinfeld's relations to the company at that time were, and under what obligations he then was to the company. The argument is conclusive that it was *necessary* for the company to own and control those adjoining properties. If Steinfeld did not hold them for the company, in what way did it control them? And how, except by his sufferance, or the following by him of his own selfish interests, could the company be benefited by his having purchased them? "The *purpose* of the acquisition of the English group was to enhance the value of the Old Boot group. The increment was the direct result of the two groups being sold as one" (Brief, page 58). In making this statement counsel has unconsciously admitted away half of his case, and the other half is squarely disposed of by the findings.

Counsel does not give the reasons for the enhanced value, except as he suggests a reason in the last-quoted sentence. The real and true reasons of the "enhanced value" were many; among them being, first, the absolute necessity of protecting the *mine* of the company—the Old Boot mine, whose ore bodies as shown by its lower workings, were rapidly running into the adjoining claims; second, the question of apex; third, the *necessity* of controlling and being able to sell and fix a price on all of the properties including the adjoining mines, the *necessity* admitted by counsel of being able to control the entire properties as

one group. It is not true, as stated by counsel on page 59 of his brief, that the company had been willing to sell the Old Boot group of mines for one-half of \$515,000.00. The very citation made by counsel is from the testimony of Curtis, one of the defendants, given on the first trial on the question of *relative* values, and which was withdrawn by the stipulation, above referred to, set out in counsel's brief. But there is in this testimony not covered by the stipulation, the absolute record that the Silver Bell Copper Company was valuing the Old Boot mine and holding it at approximately the figure for which the entire property was sold to the Imperial Copper Company.

This testimony, by reference made in the findings, is before this court.

Under heading "Nature of Steinfeld's Control of the Corporation" (Brief, pages 59 and 60), counsel has attempted to put a construction on the findings wholly unwarranted. Steinfeld's control, and his consequent acquisition of knowledge, was because he as trustee voted the 30 shares of the Wm. and Julia Zeckendorf stock, and as managing partner of Zeckendorf and Company voted the 500 shares of stock belonging to that partnership (Brief, pages 62 and 63). The corporation was able to buy and pay for those properties. If Steinfeld had caused the company to use a part of the money in paying back to him the money he had advanced, instead of using it all to develop and open up this English group of mines, this litigation never would have taken place. After he had gotten Neilson out he and Shelton were two out of the three directors, and was it not his duty to have paid himself, if there was any question of ownership of these outside properties, instead of spending money on them?

Counsel admits that the case of *Price vs. Comstock*, 121 Fed., 620, cited on page 66 of his brief, is against him. It is, and its reasoning is conclusive of the arguments we have been advancing.

Counsel says there was no concealment on the part of

Steinfeld. If he intended to buy these properties for himself, then every letter and all the other evidence referred to by counsel (still evidence outside of the findings) show that he was practicing a gross concealment, for his every statement and act was that the properties should be bought *for the company*, and everybody understood that that was just what he was doing. The arguments on pages 65 to 71 of counsel's brief are fully answered by other arguments which we have made, but more directly and forcibly by the findings themselves.

Under heading "B," page 70, counsel argues that the shutting down of the mine by Steinfeld was not such an act as would give rise to a constructive trust. This argument is, as we believe, fully covered by our opening brief on file and by the findings with reference to the damage caused the company by this shutting down, and the reasons Steinfeld had for closing down the mine.

On page 73 counsel in italics calls attention to the fact that Steinfeld caused the mine to be reopened before he went to Europe, but he fails to also call attention to the fact, commented on by us in our opening brief, that all the Arizona parties had then been taken care of, and *that the deed from the English owners was then up in escrow, waiting only for him to go to London and take it up. In fact he did not even have to go after it.*

Commencing on page 73 of his brief, under heading "The findings should be considered in the light of the entire situation as shown by the evidence," counsel devotes many pages in an effort to relieve his client from the effect, in law and in equity, of the findings on the questions of the company's control, the shutting down of the mine, the reasons therefor, the entailed loss to the company, and the acquisition of the different properties. As we understand the law and the practices of this court on appeals from the territorial court, there being no questions raised on the admissibility of evidence, the findings of fact, in the nature of a special verdict,

made by the territorial Supreme Court, are conclusive and speak for themselves, and can neither be controlled, enlarged, limited, or construed by the evidence. It is only where the evidence by reference is made a part of the findings that the evidence can be looked to at all, and then only because by such reference it is a part of the findings.

But the evidence, as a whole, not the segregated portions selected by counsel, particularly from that given by his own clients, we submit, if it were to be looked into would reveal and prove a case against counsel's client even stronger than that presented by the findings. We do not see how he can escape from either.

Under heading "C" (Brief, pages 82 *et seq.*) counsel argues as to the effect of Steinfeld's letter to Zeckendorf. The purpose of the argument is to relieve Steinfeld and his associates from the effect of the finding that Steinfeld had reported to plaintiff-appellant that he, Steinfeld, intended, *for the company*, to acquire the English group of mines, with the necessary, resultant effect of his subsequent report that he had acquired them. Steinfeld's expressed intent, connected with what he did with the company's property in order to carry out that intent, estops him from asserting that he did not buy those properties for the company. The arguments and citations under this head do not as we view them present a single question for consideration, in fact as we understand the authorities cited, they have no relevancy to the case presented to this court.

Under heading III (Brief, page 80) counsel argues that "the proposition of July 15, 1901, and the failure of the corporation to avail itself of it, concluded the corporation from contending that Steinfeld was a constructive trustee." Counsel under this heading fails to mention the fact, several times referred to by us, that Steinfeld admitted his trusteeship, and that it was arranged between him on the one side and Curtis and Franklin on the other, that that trusteeship should continue *until* an independently acting corporate

body had repudiated it. Counsel's argument that Zeckendorf is bound by what Steinfeld knew and did, in Steinfeld's own interest, does not impress us. Besides, the specific agreement was that the arrangement was to stand, *until Zeckendorf* could vote the Zeckendorf and Company stock at a stockholder's meeting to be called by Steinfeld to consider this proposition, and which meeting he failed to have called.

Under heading IV (Brief, page 91) counsel presents carefully selected segregated portions of the evidence to prove laches on the part of Zeckendorf. This court will remember that the findings (including the evidence by reference made a part of the findings) show that Steinfeld caused Zeckendorf to believe that he, Steinfeld, intended to buy the properties for the company, and that on his return from Europe he simply reported that he had bought them.

Counsel's argument under heading "V" (Brief, page 96) has been fully covered. The amended complaint has many allegations, among them being a positive allegation that the Silver Bell Copper Company was the owner of all the properties described in Schedule A attached to and made a part of the amended complaint. The facts found show an implied extension and the amended complaint supports the findings.

Heading VI, page 97 of counsel's brief is as follows: "Curtis' reports showing English group of mines as property of the Silver Bell Company, and development of said mines by the Silver Bell Company are of no effect to establish plaintiff's contention of trusteeship." Then follows an argument based partly on the findings and partly on counsel's construction of certain evidence. The findings show that Steinfeld caused Curtis to prepare these reports and maps, showing all of the properties in question, as being properties of the Silver Bell Copper Company, and that Steinfeld himself, *over his own signature*, sent these reports to others, including Zeckendorf, as being true reports of the mines and mining properties of the Silver Bell Copper Company. In

passing, we remark, that this finding of facts is one of those that we think shows an express trust, notwithstanding the direct finding that there was none. The findings of fact set out the documents and documentary facts, from which, as a proposition of law, the court should have found an express trust. It was not Curtis' reports taken by themselves that evidenced the express trust, but Curtis' reports sent out "over Steinfeld's signature," etc., that evidenced such trust, and the fact that they were prepared by his direct orders.

What follows in counsel's brief down to page 114, we believe has already been fully covered by us. With reference to the directors' meeting of May 20, 1903, we may add that Curtis' "report" was "made" in Steinfeld's presence.

As to what is said under IX commencing on page 114, we have but little here to add to what has already been said by us in this and in our opening briefs. Counsel starts out by saying "The contract of May 20 was unquestionably voidable. There were only three directors, Steinfeld was one, and Shelton, one of the others, was under Steinfeld's domination. It was a contract with Steinfeld himself." Again (page 116): "In fine, the contract of May 20 was one which Zeckendorf could have readily procured to be avoided by instituting a suit in behalf of the corporation for that purpose." Zeckendorf brought the suit. Again (page 119): "What then was the status upon the filing of this suit? *In the first place there was no defense to it. (Italics ours.) Steinfeld had voted (italics counsel's) for the resolution, and the agreement authorized by such resolution was a contract made with Steinfeld himself.*" Again, with reference to this matter (Brief, page 130): "The contract was as a matter of fact, voidable and *constructively fraudulent.* They had no choice. Zeckendorf *had the right,* and had manifested a determined intent to annul it."

We are quoting these portions of counsel's brief in order that they may be added to our argument as to the effect of

the resolution and agreements and acts thereunder, of January 16, 1904.

Most of the matters discussed by counsel under this heading are matters of evidence. He does, however, touch the findings in a few places, and one of them is where he sets forth the nature of Zeckendorf's San Francisco suit, the complaint in which was before the meeting of December 26, 1903. In response to that complaint, and at this meeting, Steinfeld stated that the *nature* of the claim which he made to the money and notes in his hands was as *security only* under the "guaranty agreement" of May 20, 1903. Nowhere did he suggest that he had any right or claim thereto other than as security, and when he had there and then turned them over to Curtis for the company he, through and by Mr. Ives, his attorney, then and there stated that he had set forth the "*nature of his claim*," that he had *complied with the prayer of the complaint*, in that he had turned over the notes and money to the president of the company, for the company, that he had presented his account as treasurer, whereupon he then demanded that the suit be dismissed. Counsel says this suit is still pending. *This is news to us.*

Mr. Ives, in his brief, page 124, sets out at some length what he testified to. As this is not in any manner before this honorable court, we leave it where it is. Whatever may be the evidence, the findings of the trial court that heard it all and of the Supreme Court that reviewed it all is here before this court, but we do take issue with the statement made, as counsel, in his brief, that his evidence was not denied.

The argument under X, page 135, is fully covered. We are perfectly willing to leave the actions of December 26, 1903, as the stockholders left them, particularly *as they intended to leave them*, as shown by and set forth in the findings. When counsel says that it was the stockholders and not the directors who rescinded the May 20 agreement, he

must mean, of course, that the directors being all controlled by Steinfeld could do only that, in dealings with him, which the stockholders had authorized.

This brings us to the most important part of this whole case, viz., that argued by counsel under heading XI of his brief, commencing at page 137. Counsel's whole defense is based upon the argument that the "unfairness" of the transaction was not shown. He himself has argued with reference to a transaction that is incomparably cleaner than this that it was "constructively fraudulent." "If constructively fraudulent" was it not constructively unfair? But, by what standard of righteousness, equity, and fairness would counsel have us judge this transaction, and not say that on its face, it was not only unfair, but entitled to have applied to it more vigorous and expressive terms.

We heretofore called to the attention of the court the fact that Steinfeld kindly caused the company, out of the one-half he was apportioning to it, to pay to Zeckendorf and Company the \$115,000.00, a large part of which went into the work of changing these "prospect holes" to mines.

Under this action, without investigation, without the knowledge of a soul but Steinfeld and his men and his attorney, Steinfeld caused to be "*given*" to himself one-half of all that the company received on May 20, 1903. Right in this connection let us call this honorable court's attention to a marvellous fact as shown by the findings, and more marvellous as shown by his own testimony. Curtis was the owner of 170 out of the 700 outstanding shares of the company, or seventeen-seventieths of this vast property. Without investigation and without consideration, but acting on the orders and directions of Steinfeld and *not otherwise* (findings) he voted to give up practically \$75,000.00 and to keep but \$18,870.00, the declared dividend on the 170 shares.

Does this shew unfairness? What answer can be made to the assertion that it was not only constructively fraudu-

lent, but was actually fraudulent? We answer none, and counsel's argument admits it, for he is driven to contend that even if actually fraudulent, still unfairness was not shown and would not be presumed.

We leave this matter on the authorities cited in our opening brief. The Supreme Court of California has given this question most elaborate and careful consideration, and its reasoning on the authorities is unanswerable, and it holds that the question of fairness or unfairness cannot even be inquired into in this kind of a case.

We again respectfully submit that plaintiff-appellant is entitled to a judgment, as prayed for by him, on every issue before this court.

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